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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 15559/2009

In the matter between:

JACQUELINE FOLLEY Plaintiff

and

PICK 'n PAY RETAILERS (PTY) LTD Defendant

MOONSTONE INVESTMENTS (PTY) LTD

t/a ZAMA CLEANING SERVICES Third Party

Delivered: 23 August 2017

JUDGMENT

BOQWANA, J

Introduction

[1] The plaintiff, a 68 year old woman, brought an action alleging that she slipped and fell at Pick 'n Pay Tokai supermarket ("Tokai supermarket"), on Sunday 13 April 2008 while shopping with her friend, Mrs Ilse Garrard. She was 59 years old at the time of the incident. She sustained injuries as a result of the fall.

[2] She initially caused summons to be issued, for payment of damages, only against the defendant, on 09 August 2009. In paragraphs 3 and 4 of her amended particulars of claim, dated 22 April 2014, she alleged that she slipped on water present on the defendant's supermarket floor, as a result of which she fell and that such fall was caused by the sole and exclusive negligence of the defendant and its employees in that it/they were negligent in one or more of the following respects:

> "4.1. They permitted water and/or a slippery spot caused by moistness to be present on the supermarket floor in the aisle where Plaintiff was walking, and by doing so permitted the supermarket to become slippery;
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> 4.2 It permitted the cleaners to wash the supermarket floor without cordoning off that particularly [sic] area and/or without putting up visible warning signs, warning shoppers against slippery floors;
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> 4.3 It failed to take reasonable steps to prevent harm to its customers whilst, by the exercise of reasonable care, it could and should have done so."(Own emphasis)

[3] It was highlighted on behalf of the defendant that the allegations pleaded by the plaintiff did not state that such cleaners were employed by the defendant and were acting within the course and scope of their employment, which allegation, according to the defendant, would have been essential in a claim to hold the defendant vicariously liable for any negligent act or omission by those cleaners.

[4] According to the defendant's counsel, Mr Crowe SC, had the plaintiff positively alleged that the cleaners were employed by the defendant, the defendant's representative would have been obliged to take instructions on that allegation and it is probable that the defendant would have denied that allegation in its plea and would have pleaded over to allege that the cleaners were employed by an independent cleaning contractor, namely the third party.

[5] The defendant denied the allegations and further alleged that the fall was caused by the plaintiff's own negligence, in that she failed to keep a proper lookout and to take any or adequate steps to avoid the fall, when by exercise of reasonable care she could and should have done so.

[6] It was further submitted on behalf of the defendant that to be extra careful and in order to ensure that the plaintiff could not allege in due course at the trial that she had been taken by surprise by the evidence that was to be adduced, the defendant indicated to the

plaintiff its intention to amend its plea to insert the following new paragraphs, 4.2.4 and 4.2.5, therein:

> "4.2.4. In *the further alternative*: at all material times the Defendant had contracted with a specialist independent contractor, Moonstone Investments 15 (Pty) Limited t/a Zama Specialised Cleaning ("Zama Specialised Cleaning"), to keep the Defendant's Tokai supermarket clean, neat and tidy. In terms thereof, *inter alia:*
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> 4.2.4.1 Zama Specialised Cleaning was obliged to, and did, place fully trained employees at the Defendant's Tokai supermarket in order to keep the floors clean, neat and tidy on a daily basis and generally to ensure that the floors were safe for use of members of the public;
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> 4.2.4.2 Zama Specialised Cleaning employed a supervisor who was in control of and supervised the cleaning staff whom it placed at the Defendant's Tokai supermarket;
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> 4.2.4.3 The Defendant paid Zama Specialised Cleaning a monthly fee of R24 608.09 to provide such cleaning services.
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> 4.2.5. In the premises, the Defendant denies that it is liable to the Plaintiff in the event that the employees of Zama Specialised Cleaning were negligent as alleged or at all."

[7] The plaintiff objected to this proposed amendment and this resulted in the defendant filing an application for leave to amend its plea. The matter was set down for hearing on 26 November 2014, but did not proceed as the parties took an order by agreement that the defendant may amend its plea by introducing the paragraphs that I have already referred to.

[8] The costs of that application stood over for later determination at the trial. The defendant claims that the plaintiff ought to be ordered to pay these costs. I will deal with this issue later.

[9] The plaintiff served a third party notice on the third party on 2 February 2015, as indicated in the letter written to the third party by the plaintiff's attorneys on 23 February 2015. That notice, however, does not form part of the record. Another third party notice was served on 12 March 2015, which was more than 6 years after the incident. This, whilst irregular, was not contested by the third party.

[10] In paragraphs 4 and 5 of the amended annexure to the third party notice, the plaintiff alleged that she slipped on water present on the defendant's supermarket floor, as a result of which she fell and that her fall was caused by the sole and exclusive negligence of the

defendant and/or the third party and its employees in that it/they were negligent in one or more of the following respects:

> "5.1 It permitted water and/or a slippery spot caused by moistness to be present on the supermarket floor in the aisle where Plaintiff was walking, and/or permitted the floor to be wet and/or moist, and by doing so permitted the supermarket floor to become slippery;
>
> 5.2 It permitted the cleaners to wash the supermarket floor without cordoning off that particularly [sic] area and/or without putting up visible warning signs, warning shoppers against slippery floors;
>
> 5.3 It failed to take reasonable steps to prevent harm to its customers whilst, by the exercise of reasonable care, it could and should have done so."

[11] Once again, so it was submitted by the defendant's counsel, the plaintiff failed to make essential allegations to hold the third party vicariously liable for any negligent act or omission on the part of the cleaners, referred to in paragraph 5.2 of the annexure to the third party notice: namely that they were employed by the third party and were acting within the course and scope of their employment when they committed the alleged negligent act or omission in question. It is the defendant's view that the plaintiff will have to overcome this defect in the pleading before she can succeed in any claim to hold the third party vicariously liable for the damages that she allegedly suffered as a result of the fall.

[12] Upon being threatened with a notice of bar, on 19 May 2015 the third party filed a special plea of prescription, submitting that the plaintiff's claim fell due on 12 April 2011 (being three years after the date on which the claim arose) and accordingly it had become prescribed against the third party, as the third party notice was issued on 29 January 2015 and served on it on 27 March 2015. The third party also pleaded to the plaintiff's notice. In its plea it denied the allegations in paragraphs 4 and 5 of the plaintiff's notice and alleged, *inter alia*, that the fall was caused solely through the negligence of the plaintiff, who was negligent in that she failed to keep a proper lookout and to avoid injury to herself when, through the exercise of reasonable care, she could and should have done so.

[13] During the pre-trial stages the parties entered into an agreement, which was endorsed by the case management judge, Roger J, and made an order of court on 12 November 2015. In terms of the order issues of liabilities and quantum were separated. The only issues that stood to be determined during the trial were whether it was the defendant or the third party

that carried the risk of liability at the date of the plaintiff's injury and, only in the event of the third party being found to have been at risk at the date of the plaintiff's injury, the merits of the third party's special plea of prescription would be determined.

[14] The matter was set down for trial on 15 August 2016. At the inception of the trial Mr Nel, who appeared for the plaintiff, advised the Court that his client was in Scotland and could not travel to South Africa, on medical advice. He requested that the plaintiff be allowed to her give evidence via video-link and that this could only take place at an outside venue. An impression was created that the parties were all in agreement that this could be done. It became apparent, however, during the morning before the trial would commence, that there were outstanding issues that needed to be resolved.

[15] It was apparent that the plaintiff's attorney had already secured a venue at the Cape Town International Convention Centre ("CTICC"), incurred expenses and made arrangements, without first checking with the other parties and obtaining leave of the Court. Mr Nel submitted that the CTICC was the only reasonably feasible alternative, since the Court did not have the facility required to conduct video-link proceedings where the plaintiff would be able to see all those present in Court. The Office of the Chief Registrar was not notified timeously so as to arrange recording facilities and this caused a lot of inconvenience to all concerned and delayed commencement of the proceedings.

[16] Furthermore, Mr Seale, who appeared for the third party, indicated that his client wished who raise a point *in limine* - that it was not properly joined as a party to these proceedings, in compliance with Rule 13 (3) (b), as the plaintiff had not sought leave of the Court to join it as a third party, after pleadings had closed.

[17] Mr Seale submitted that in view of the fact that the third party was not properly a party to the proceedings, its participation in the hearing of the plaintiff's evidence might create an impression that it conceded to having been properly joined, if the matter proceeded prior to that issue being resolved.

[18] It was agreed that, because of the fact that the plaintiff's legal representatives had gone ahead and secured a venue, with video linkage, which was paid for, and that the plaintiff had driven to a studio in Glasgow, where the facilities were connected, the point *in limine* would be heard on 17 August 2016. It was further agreed that the plaintiff's evidence would be ring-fenced for purposes of convenience and the third party would cross examine her without waiving its right to raise its point of law.

Proceedings via video-link and at a venue other than a court room

[19] In *Uramin (Incorporated in British Columbia) t/a Areva Resources Southern Africa v Perie*[1], Satchwell J dealt with the use of a video-link to procure the evidence of witnesses who were based in Paris and Dubai, and who were not available to attend Court in Johannesburg. In her judgment she found for the use of video-linkage in appropriate cases. Her view was that South African courts should be attuned to modernised technology and use it if it is absolutely impossible to procure the attendance of witnesses in Court.[2] In her opinion, Courts have recognised the need to accommodate witnesses to meet the interests of justice in many instances such evidence being received on affidavit or by way of closed-circuit television.[3]

[20] In my view, there were compelling reasons for the Court to allow employment of video-linkage in this case. As the principal witness in her case, it was imperative that the plaintiff's evidence be procured. Having been satisfied about the surroundings of the venue from where she testified, and there being no objection, the Court allowed the matter to proceed. Both the visual and verbal evidence was clear. There were no time delays or lapses. The screen was initially focused on the upper body of the plaintiff, including her face, and later enlarged onto the face. The Court's portable recording facilities were used to record the proceedings.

Third Party's point *in limine* and Plaintiff's Conditional Condonation Application

[21] The proceedings resumed at the Court premises on 17 August 2016. Argument on the point *in limine* lasted for two days and the plaintiff was granted an opportunity to file an application for condonation in the event the Court were to find that leave of the Court was necessary, prior to the service of the notice to the third party joining it to the proceedings. By agreement between the parties the matter was postponed to 13 October 2016 to allow for the filing of papers and hearing of argument on the condonation application.

[22] Having considered the papers and submissions made by the parties, I upheld the point *in limine* and condoned the plaintiff's non-compliance with Rule 13 (3) (b) for the reasons that follow.

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[1] 2017 (1) SA 236 (GJ)
[2] See *Uramin* supra and in particular paras 27 to 29
[3] At para 25 to 26

[23] Mr Seale submitted that the third party's attorneys wrote numerous letters to the plaintiff's attorneys, requesting a copy of the application that would have had to have been brought in terms in terms of Rule 13 (3) (b), seeking the leave of the Court prior to the serving of the third party notice. According to him, the third party's attorneys had also made several attempts to locate the Court file to obtain these documents.

[24] It must be noted that the third party did not file a formal application with an affidavit to explain these attempts. Mr Seale raised the point *in limine* from the bar and submitted that such an application was not necessary, because correspondence between the parties' attorneys bear these attempts out. Furthermore, whether or not a formal application was made was neither here nor there, as the crucial point of whether the third party was properly before the Court was a legal one which would not be changed by the fact that such argument was not supported by any application.

[25] Mr Seale submitted that according to the pre-trial minute of Thursday 12 August 2016, the third party requested the plaintiff to admit that it did not bring an application in terms of Rule 13 (3) (b) for permission to join the third party after close of pleadings. The plaintiff's legal representatives undertook to revert and in their response they admitted, for the first time, that there was no application to join the third party. They further recorded in the pre-trial minute that the third party had not raised any such defence in its plea and was precluded from doing at that late stage. The third party stated in the aforesaid pre-trial minute that it wished to raise a point *in limine* that it had not been properly joined in the matter.

[26] According to Mr Nel, the reason for filing the third party notice in March 2015 was patent from the pleadings read with the third party notice. He submitted that long after the initial close of pleadings the defendant amended its plea and by so doing, for the first time, introduced the existence and/or relevance of the third party to the plaintiff and to the proceedings. Prior to this, the plaintiff had no knowledge of the possible involvement of any third-party and/or the existence of the third party as cited and therefore it was not possible for it to have issued the third party notice earlier. He submitted further that by introducing the amendment, the defendant had re-opened the pleadings.

[27] After hearing the point *in limine*, the plaintiff was afforded an opportunity to file a condonation application in the event the Court were to find that indeed leave of the Court

should have been sought. The plaintiff subsequently filed a conditional condonation application, after which the third party filed answering papers.

[28] Rule 13 (3) (a) provides that:

> "The third party notice, accompanied by a copy of all pleadings filed in the action up to the date of service of the notice, shall be served on the third party and a copy of the third party notice, without a copy of the pleadings filed in the action up to the date of service of the notice, shall be filed with the registrar and served on all other parties before the close of pleadings in the action in connection with which it was issued." (Own emphasis)

[29] Rule 13 (3) (b) specifies that:

> "After close of pleadings, such notice may be served only with the leave of the court." (Own emphasis)

[30] Mr Seale argued that, in view of the fact that leave of the Court was not obtained, the service of the notice to the third party amounted to a nullity. In other words, it was as if it was never served and it was immaterial that the third party participated in the pre-trial process by filing a plea and becoming involved in pre-trial conferences and exchange of pleadings between the parties.

[31] A lot of unhappiness was voiced by both the plaintiff's and the defendant's counsel regarding the manner in which the point *in limine* was raised, including the fact that the third party waited until the commencement of the trial to raise the issue.

[32] Much debate ensued as to whether pleadings had indeed closed before the notice was served on the third party and whether the Court's leave was required. Rule 29 stipulates that pleadings shall be considered closed if:

> "1(a) either party has joined issue without alleging any new matter, and without adding any further pleading;
>
> (b) the last day allowed for filing a replication or subsequent pleading has elapsed and it has not been filed:..."

[33] It is clear from the chronology of events that after the defendant filed its plea during September 2009, no replication was filed 15 days thereafter as required by the Rules. The filing of the replication would have lapsed during October 2009. It was alleged on behalf of the plaintiff that the pleadings had "initially closed". According to the plaintiff issues were

re-opened in December 2014 when the defendant introduced an amendment to its plea. In *KS v MS*[4], the Court held as follows at paras 16-18:

> "[16] … It is when the parties 'add to or alter the issues they are submitting to adjudication', by amendment or agreement, that 'a new obligation' comes into existence and a fresh situation of litis contestatio arises.
>
> [17] In casu the issue to be determined has remained the same, notwithstanding the late amendment of the pleadings.
>
> [18] The question therefore still remains – whether the date for determination of accrual is at litis contestatio or the date of divorce."

[34] The pleadings were deemed to have closed during October 2009 after the period in which to file the replication had lapsed. Even if Mr Nel were correct that they were re-opened by the amendment to the defendant's plea, the amended plea was filed in December 2014 and no replication was filed 15 days thereafter. Accordingly, even if pleadings could have been considered re-opened by the defendant by virtue of an amendment to the plea, they closed again in January 2015.

[35] The plaintiff's reason for not having served the third party with the notice prior to close of pleadings, is that she did not know about its existence. A notice of amendment of plea was filed in June 2014, at least by then it was clear that there was a third party involved, the plaintiff did not file the notice then either.

[36] Be that as it may, on the facts before the Court pleadings had already closed when the third party was served with a notice joining it to the proceedings and the leave of the Court was required prior to service of the third party notice, in compliance with Rule 13 (3) (b), and this was not done by the plaintiff.

[37] The next question is whether failure to comply with this Rule can be condoned by the Court. In terms of Rule 27 (3) "*[t]he court may, on good cause shown, condone any non-compliance with these rules."*

[38] Mr Seale argued that the Court would be condoning a nullity if it condones non-compliance in this case. Furthermore, it cannot condone non-compliance retrospectively. He referred to the decision of *Orion Real Estate Limited v Cobra Watertech (Pty) Limited and Others In re: Orion Real Estate Limited v Cobra Watertech (Pty) Limited and Others*[5]. This

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[4] 2016 (1) SA 64 (KZD)
[5] (28166/2007) [2011] ZAGPJHC 10 (14 March 2011)

judgment does not, in my view, support the third party's proposition. The Court in that matter stated that: *"...a party cannot...seek retrospective condonation for an irregularly served third party notice - i.e. such a notice served after the close of pleadings but without the antecedent leave of the court"* (at para 6). The Court then went on to say at para 8:

> "I fully accept, as counsel for the applicant invited me to do, that, as was said in Mynhardt v Mynhardt, in addition to the provisions of Rule 27 (3), the court has, in any event, inherent jurisdiction derived from common law to condone non-compliance with its rules. In summary, I accept that the court has a wide discretion in a matter such as this – a discretion that must nevertheless be exercised judicially. In other words, ultimately the niceties of interpretation of Rule 13 (3) (b) and Rule 27 (3) do not really matter in an application such as this. What matters is whether, in all the circumstances, justice will be better served by condoning a non-compliance with the court's ordinary rules or by granting an indulgence." (Own emphasis)

The application for condonation was dismissed in that case, due to the inadequate explanation for the delays in failing to serve the third party notice before close of pleadings and to apply for condonation in a reasonably good time.

[39] I find the bulk of the explanation given by the plaintiff irrelevant to the question of why leave of the Court was not sought prior to serving the third party with the notice joining them in the proceedings after close of pleadings. It could not be said that the plaintiff laboured under the impression that pleadings had not closed. Mr Nel spoke about a loose agreement that the parties had regarding the filing of documents. That, however, has nothing to do with the plaintiff's failure to ask the Court for permission to serve notice on the third party.

[40] Be that as it may, this must be balanced with other factors, namely, that the third party's involvement was key to the resolution of the case at hand, there being an allegation that it was contracted to clean the Tokai supermarket at the time of the incident. Furthermore, it waited until the commencement of the trial to raise the issue of its 'irregular' joining into the proceedings, having filed its plea and participated in all trial preparations at the pre-trial level and agreed with the other parties before Rogers J as to which issues would be determined by the Court, as per Court order dated 12 November 2015. Having asked the attorneys of the plaintiff for a copy of the application in April 2015, it could not sit and wait for almost one year before sending another letter requesting that application. It appears from the answering affidavit to the condonation application that attempts to obtain the Court file

were made on 15 April 2015 by the third party and the filing clerk said they are waiting for the file from the service provider and that it was expected to be back by 22 April 2015. On 22 April 2015, another attempt was made and the hand written note attached to the answering affidavit records that the file had not arrived. It states thus: "*Clerk said file should arrive next week – 28 April 2015, I will attempt to uplift the file again*." There is no record that the person who attempted to uplift the file went again on or after 28 April 2015 to uplift it. Having sent another request to the plaintiff's attorneys for a copy of a joinder application almost 10 months later, on 25 February 2016, the third party's attorneys received a response that there was no "*further joinder application"*. It boggles the mind why, if that response was ambiguous, the third party did not seek further clarity thereon and uplift the Court file, as it would have been long after 28 April 2015. The question posed to the plaintiff's counsel at the pre-trial conference of 11 August 2016 about the existence of the application, was months after the response given by the plaintiff's attorneys on 26 February 2016 and a few days before the trial was to commence on 15 August 2016.

[41] Refusing condonation under these circumstances would not serve the interests of justice and would be prejudicial to the other parties. It would mean that the third party is released from the proceedings. It was submitted that a strong possibility could arise that the plaintiff's claim against the third party had prescribed and if it was granted leave to serve the third party notice afresh, only then would the running of prescription be interrupted. In this instance, all the parties had already filed all the pleadings and participated in pre-trial procedures. I also could not ignore the rule 37 minute dated 22 October 2015 which was signed by all parties, including the third party, recording that: "*2. No party feels it has been prejudiced for want of compliance with the Rules of Court by any other party*." The defendant might also be prejudiced in that if it were to be found to be a joint wrongdoer, the other alleged joint wrongdoer would no longer be available. It was plain in my view that the most appropriate order was to condone plaintiff's non-compliance with Rule 13 (3) (b).

The further conduct of the matter

[42] The leading of further evidence proceeded from 17 to 19 October 2016 and the matter was then postponed for argument to 09 February 2017. On the day of argument, Court management issued a directive that all courts be adjourned at 12:45, in view of the State of the Nation Address proceedings that were to take place in Parliament, which would have affected the Court's personnel. Parties agreed that it was imperative that the Court adhered to this directive and adjourn proceedings. It was agreed that argument by all parties would be

truncated and a reply would be furnished in writing by Mr Nel on an agreed date. Upon the filing of these written submissions by the plaintiff, Mr Crowe requested an indulgence to file brief submissions to deal with aspects that arose from the replying heads of argument, which he felt would be prejudicial if it was not granted an opportunity to address in view of the oral argument having been considerably curtailed. I granted the indulgence and pointed out that such rebuttal must be limited to 'new' issues raised in reply. The defendant filed a 50 page document. The plaintiff filed a further reply thereto. The defendant then asked to file 'surrebutting' heads on the basis that the plaintiff's further replying heads of argument contained various false and misleading misrepresentations. This obviously interfered with the finalisation of the matter.

[43] I called the parties to my chambers to resolve any outstanding issues so as to bring an end to the filing of further submissions. Parties advised me, *inter alia*, about an intended further amendment to the particulars of claim, which was later withdrawn. The defendant also advised that the plaintiff had included an incorrect set of particulars of claim as part of the record. The parties advised that they would converge and agree as to what set of pleadings ought to have been placed in the bundle. Indulgences were sought by the parties, on compassionate grounds, which delayed their convergence to sort out the record and place the correct set of pleadings in the bundle. All these intervening issues were finally resolved on 01 June 2017.

Plaintiff's case

[44] The plaintiff testified in support of her case and also called Mrs Garrard, her friend who was with her at the time of the incident. The plaintiff's testimony was in essence that she had formerly been an actress, director, stage manager, theatre manager and teacher. She was currently not employed, as she had had an operation and could not walk properly. On Sunday [13 April 2008], she had gone out for lunch with Mrs Garrard and on their way home they decided to go to the defendant's Tokai supermarket to buy coffee. The supermarket was the biggest near to where she lived. They went into the supermarket, with Mrs Garrard following behind her. The plaintiff went up to what she believed was the third aisle. At the end of the aisle, near the cashiers, she turned to her right. As far as she could remember she did not have anything in her hands and she had not yet gotten what she was looking for.

[45] As she turned, her feet slipped out from underneath her; her whole body twisted and she landed on her left knee. From that moment onwards she was in such pain that she lay

screaming on the floor. She stated that due to the extreme pain, her recollection of the event may not be wholly accurate in terms of details. She testified that: "*it would be coloured with pain"*. She was unable to move her leg, and became aware of one, possibly two, people with mops standing to her left. She "briefly saw the mop". Her next awareness was of a female customer who had come to her assistance and was leaning over her. Mrs Garrard then approached; she was very worried. Someone she did not know sent for the manager. When the manager eventually arrived he spoke to her, but she could not recall the content of that conversation. The manager sent for a wheelchair and when it arrived two people, possibly Mrs Garrard and the manager, helped her into it. She was then wheeled across the store to the manager's cubicle where she was given a glass of water. She was obviously quite shocked. Eventually she was wheeled out and loaded into the vehicle.

[46] As she was unable to drive, Mrs Garrard drove her home and, with great difficulty, helped her upstairs to her apartment and into bed, where she put "something" on her knee. She took pain medication, but was unable to sleep that night and went to Constantia Berg Clinic the following morning. At the time of the incident she had been wearing flat, rubber soled walking shoes, which she had had for some time (having purchased them for a hiking trip through Loch Lomond in Scotland) and which had never before caused her any grief. When asked about the cause of her fall, she indicated that due to her profession she was very nimble, and would not have fallen had the floor not been slippery. She seemed to think that Mrs Garrard felt the floor and it was damp. Prior to moving to Scotland the plaintiff had taught movement at the University Opera School in Cape Town, and movement and acting in Durban. She stated that during a controlled fall on stage, one would know exactly how to land. She described her fall on the day of the incident as being an uncontrolled fall, as she had no control over her legs and was unable to help herself. She instituted action against the defendant because the incident occurred in its store and she therefore believed that it was its responsibility that she fell. She did not have the opportunity to inspect the floor surface where she slipped. She dismissed the possibility that her fall had been caused by her own negligence, stating that she had walked along the aisle as any normal person would and had not caused herself to fall. She stated further that had there been signs to indicate that the floor was wet, she would have known to take care, as, having lived in Scotland; she was accustomed to walking on wet surfaces. However there had not been any signs.

[47] In cross-examination by Mr Crowe, she conceded that she fell at 13:55, as per the video footage. The shoes she wore that day were brown, flat, slip on court shoes, which were

not laced, but which were suitable for walking. She had purchased them approximately two or three years prior to the incident. She denied that the shoes had been worn out at the time of the incident. Before the fall, she had been in aisle 3, near the entrance of Pick ‘n Pay, for no longer than five minutes. She conceded that she had not seen any sign of wetness on the floor, as she had been looking at the shelves rather than the floor. She testified that, had she looked at the floor, she would have seen that there was something wrong with it and she would have been careful. Although she had not personally confirmed that the floor was wet, from her experience that is all that could have caused her to fall on an otherwise normal tiled surface. It was an assumption that was later confirmed by Mrs Garrard and the fact that she had seen somebody with a mop, as one does not mop up dry goods. She must have disposed of the shoes she had been wearing sometime in 2012, because her walking days were over. She recalled her attorney, Louis de Villiers, advising her to hang on to the shoes.

[48] She had reached the end of the aisle and was in the process of turning to her right when she fell. It was not a sharp turn. It is very hard to say whether the fall would have taken place had she not been turning, but she thought she would have fallen anyway. Mrs Garrard told her she had knelt down and felt the floor. She could not remember the exact moment that Mrs Garrard told her, but it was probably in the supermarket. She conceded that that was a pure guess; it could have been afterwards. Mrs Garrard told her that the floor was damp and wet. She was referred to a letter she had written to the manager of Pick ’n Pay shortly after she had been to the clinic, presumably in 2008. In that letter she stated that she slipped on some water on the floor. She was challenged that that was contrary to her evidence in Court, because at that time she referred to water while in testimony she referred to liquid. She responded by saying that there had been some form of liquid on the floor and water is liquid. She testified that perhaps she had written the letter without Mrs Garrard having spoken to her. She conceded that liquid could be a substance other than water, such as liquid soap. She did not know all that, it was an assumption.

[49] On 9 April 2010 she wrote a letter to Mrs Ackerman, wife of the defendant’s chairman, Mr Raymond Ackerman, in which she stated that she had slipped on some water at the defendant’s store and injured her knee. It was put to her that this letter was written long after she had spoken to Mrs Garrard and had been told by Mrs Garrard that it was liquid rather than water. She responded by saying that it was probably because she considered water and liquid to be the same thing. If it could have been oil, she would have said oil. Mrs

Garrard had told her that she felt the floor so whether it was visible or not, she was not sure. She had not been walking on leaves or mud or any other sodden surface, prior to the incident.

[50] She doubted very much that something had been stuck on her shoe, as suggested to her by Mr Crowe. She had examined the shoes afterwards at home, because she would not put dirty shoes away. She wore the shoes afterwards because it was her knee and not her foot that was compromised.

[51] A surveillance video from the Tokai supermarket, dated 13 April 2008, was shown in Court. A female cleaner is shown carrying an object with a stick. There is a bit of commotion at 13:55:51 and that is when the parties believe the fall took place. The same cleaner comes back after the plaintiff had fallen, carrying what the plaintiff believes to be a mop. The cleaner goes away and someone goes to the plaintiff, appearing to be attending to her. According to the plaintiff, the person bending over her with the light coloured top was Mrs Garrard. There is a person standing behind a wheelchair wearing a blue shirt. Another person wearing a blue shirt arrives. A person believed to be Mr Mackay kneels and talks to the plaintiff. Later the plaintiff is pushed away in a wheelchair. The plaintiff conceded that there were two managers from the defendant, but disputed that the person bending over her with a light coloured top was a manager.

[52] In cross examination by Mr Seale, the plaintiff testified that her body twisted to the right and she fell that way. She landed on her left knee. She had not taken a step towards turning, her intention was to turn. Mrs Garrard had been behind her. She had not seen any of the "defendant's" cleaning staff before she fell. She had not seen anybody working or mopping, she had been looking at the shelves. It was pointed out to her that she had mentioned in her undated letter, addressed to the defendant, that Mrs Garrard had pointed out skid marks to the representative of the staff. She testified that Mrs Garrard must have told her this, as she herself had not seen it. The soles of her shoes had been made of good solid brown rubber. As she hit the ground, (facing the right-hand side) she saw a person standing with a mop, at the end of the aisle to her "right-hand side", not at any T-junction. When she fell her feet went to the left and her head to the right. She must have been caught by the camera as she came out of the aisle; with her back towards the cross of the T-junction. The cleaner would have been on her "left-hand side". She did not know what the cleaner had been doing before she fell, but when she fell, "he" was there.

[53] She remembered going to the manager's office in a wheelchair, but could not swear to any information she gave there. She was referred to an incident report where a certain Nikita Gouws, who is alleged to be an independent person, indicated: "*Statement of witness. Did not mop there. Just saw customer fall.*" She testified as to that report that she would not know whether a contractor working for a company was independent of that company or whether they were an employee of that company. She agreed that the information contained in the report that "*...customer had had an op on left knee previously and that was the same knee"* must have been obtained from her. She had had an operation on her knee 30 years ago, but how the information was transferred to that form she did not know. She agreed that she was not in a position to contradict what was written on the document that: "*We as management checked the floor and area as well the camera and found no issue or cause to cause the fall*."

[54] She agreed that she gave instructions to her attorney, for the purpose of summons, to the effect that she had slipped on water, she however stressed that she did not see the difference between water and liquid. She did not know why, after summons was issued in August 2009 and the defendant's plea was filed in September of that year, nothing happened for a very long time. She made enquiries as to what was happening. She conceded that a period of five years had gone by before anything significant happened, but mentioned that she kept phoning and asking for something to be done to move the case forward and that was when she met Advocate Nel and Mr De Villiers handed the case over. She had a feeling that Mr De Villiers had a lot on his plate and she was at the bottom of the pile. She continued going to the Tokai supermarket where she fell, as it was the nearest big supermarket, before she went to Scotland on 17 November 2012. She agreed that during that time she saw that the defendant's staff wore blue uniforms. She did not recall seeing cleaners in the store during that four year period. She did not take interest in seeing cleaners at the store. She knew that Mr De Villiers had received a video in about June 2010, because she had asked him to request it.

[55] She confirmed that in the video clip she saw a female cleaner with a dustpan and stated that one could use a scoop with a mop if, for instance, there was a broken glass with liquid on it. She also saw a gentleman with a mop in the video and confirmed that the mop held by that cleaner hung vertically. She agreed that the person appearing on the video at 13:45 was carrying a broom. The video was again started at 13:55, which was two minutes after the man with a mop was seen going down an aisle. At 13:55 a female cleaner was seen walking from right to left. The plaintiff maintained that that cleaner who was making side to

side movements was carrying a mop. She disagreed that that cleaner was walking down the aisle and not in the same area where she fell.

[56] She did not know that the defendant outsourced the cleaning functions; she thought the cleaners were the defendant's employees. In retrospect she would agree that the different uniform is an indication that they were employed by a different entity and it was a simple matter to establish the identity of their employer.

[57] In re-examination, she confirmed that nobody from the defendant contacted her to say that a cleaner (that may have caused the fall) was not in the employ of the defendant. In response to her letter to the defendant's manager and a letter of demand issued by her attorneys she was never informed that she was suing the wrong people. When summons was issued and served in August 2009, she received no notification from the defendant that an independent cleaning company was involved. The first time she became aware of this, was when she was living in Scotland already. She could vaguely remember that Mr De Villiers handed over his file to the present attorneys because he was retiring. The operation she had had on the knee was 30 years from the day she testified, but 22 years from the day she fell. Prior to the fall she had not experienced any problems with instability. She relocated to Scotland because she could no longer continue to work as a movement instructor.

[58] Mrs Garrard testified that she was a retired opera singer. She and the plaintiff were great friends and at the time of the incident they stayed next to each other in a security complex. They had lived as neighbours for four years. On Sunday 13 April 2008, she and the plaintiff had gone for lunch and thereafter decided to go and have coffee at one of their houses. They stopped at the defendant's Tokai supermarket to get coffee. They went in the plaintiff's car and the plaintiff was driving. At the supermarket the plaintiff walked in first and Mrs Garrard went and got a little cart, as they did not have a lot of shopping to do. The plaintiff went up to the right of the shop, which she thought was aisle 6, looking for the coffee. The plaintiff was walking about one and a half to two metres in front of her. Mrs Garrard was not shopping, she just followed the plaintiff. They turned into and walked up aisle 5. The plaintiff was still looking left and right for coffee and they came to the end of the aisle 5. As she was watching her, the plaintiff turned the corner to the right side and came out of aisle 5. The plaintiff just went down; crashed down onto the floor. She did not know what had happened. It happened so fast and there was no doubt in her (Mrs Garrard's) mind that the plaintiff had slipped. The plaintiff was turning to the right and looking up and just

went down like a sack of potatoes. Both her legs slipped out from under her. She did not fall over anything. Mrs Garrard looked to where the plaintiff would have stepped, and there was "a girl" standing with a mop at the corner of the aisle. There was also a male employee on his haunches, on the floor. She did not know what this gentleman was doing, whether he was perhaps putting things on the shelf.

[59] Mrs Garrard referred to what she called a very rough drawing (sketch plan) that she drew [to illustrate what she saw], but pointed out that she was not an artist. There was no objection to this drawing or rough sketch plan being used and it was admitted as an exhibit. She pointed out that the figure at the corner of the aisle in the sketch plan, by the supervisor's desk, was the plaintiff.

[60] In terms of the sketch plan, the plaintiff's head is lying on the right, at the corner of the aisle, while her feet are lying on the left hand-side, inside a circle which Mrs Garrard depicted to be the slippery patch which she said she tested. A female person with a pony tail, carrying a mop, is to the left of the plaintiff by her feet, in an area Mrs Garrard depicted as the main corridor (that is where the aisle and the main corridor intersect). In the aisle is the man sitting on his haunches. According to Mrs Garrard, the female person with the mop was just standing, looking at the plaintiff, because she had just fallen. There were quite a lot of people around the plaintiff. The only thing she could remember was that the person with the mop had a pony tail or a bun on the back of her head. That is all she saw. The gentleman on his haunches had no uniform on, but was definitely the defendant's employee. This gentleman was about a metre away from the person with the mop. The impression she got was that these individuals were stunned. At that point she thought the lady standing with a mop must have been wiping where the plaintiff fell. She bent over the plaintiff to see if she could help her, but the plaintiff was in such agony that Mrs Garrard was actually afraid to try and get her to stand up.

[61] Mrs Garrard then wanted to see why the plaintiff had slipped. She went more or less to the patch where the plaintiff's feet were, or had, or must have been, and there was no water on the floor; there was also no bucket of water anywhere, but she put her foot out on the spot and it was very slippery. Mrs Garrard was wearing sandals because it was summer. She tested the floor with just one foot and thought "ooh that's slippery". Somebody called the manager, who came to investigate. He spoke to the plaintiff. A wheelchair was brought and the manager helped the plaintiff into the wheelchair. This manager sat on his haunches and

spoke to the plaintiff. He was very polite to her. There was another man there whom she was not aware at the time was also a manager. The first manager wheeled the wheelchair away to his office. He told the other man to go and inspect the spot that Mrs Garrard had said was slippery. This man did that. He went down on his haunches and felt it with his hand. He did not say anything to her at that point, but she did read his "affidavit" afterwards in which he said it was bone dry. She stated that anybody who had ever mopped a tiled floor would know that it actually dries within five to six minutes. So, she believed that it was probably dry when the man felt it, but that was at least five or six minutes later. When this man was testing the floor, she was standing, watching him. The plaintiff and the first manager had gone to the manager's office. After everybody had dispersed, she followed the wheelchair and went to be with her friend. The manager helped the plaintiff to the vehicle, after which Mrs Garrard drove the two of them home as the plaintiff could not drive.

[62] She was close to the plaintiff and nothing impeded her vision. The yellow warning signs usually put up when a floor is wet, were not in place. She confirmed that she had seen and studied the video footage and that the person bending on the video with a light coloured top was her. (Mr Crowe indicated that this issue was no longer placed in dispute.)

[63] In cross examination by Mr Crowe, Mrs Garrard testified that there was nothing shiny on the floor and there was no water lying there and so she went and put her foot on it and it was very slippery. She then went on to state that before she put her foot down, she bent down and saw that it was shiny. The man sitting on his haunches had a sweater on and the lady with a mop was wearing a dark or navy blue uniform. There may have been a logo but she did not notice it. The lady was slightly turned away from her so she would not have been able to see it. The lady was definitely carrying a mop because she saw it splayed out.

[64] According to Mrs Garrard the female cleaner in the video moving left and right was carrying a mop, as one would not make those movements with a broom. According to her, the female cleaner in the video could have been the one she saw standing after the plaintiff had fallen. In the video there were two female cleaners, one with a ponytail and one without. She confirmed that she saw the cleaner with a ponytail. She then stated that she thought she remembered a ponytail but she was not sure. Later on she testified that: "*I may have been influenced with the ponytail by looking at the video…I cannot in all honestly say that the day I saw her standing there, I actually saw a ponytail*."

[65] She stated that the plaintiff probably erroneously said that she had slipped on water, in the letter she wrote to the defendant. According to her, the plaintiff did not know what she slipped on. She agreed that many things like oil, cream, butter and water could make the floor slippery. She stated that feeling the floor with a shoe is just as good as feeling it with a bare hand.

[66] In cross examination by Mr Seale she testified that there was only one person with a mop, and not two as indicated by the plaintiff in her letter to the defendant. She disagreed when it was put to her that what the male cleaner was seen carrying on the video was different to that which the female cleaner was seen carrying, stating that the pictures were too unclear to come to a conclusion like that. She testified that though it was unclear what the lady was carrying, the movement she was making looked like she was mopping.

[67] She conceded that in the video the female cleaner with the ponytail was not at the corner that she drew in the rough sketch plan. It was put to her that her recollection seemed to be from what she viewed in the video rather than of the events. She testified that the video underlined her recollection of what happened.

[68] She also conceded that the two people the plaintiff said she saw in her letter must have been two people in uniform, the lady with a mop and the gentleman crouching. She confirmed that there were a number of people walking in that aisle before the plaintiff and no one slipped before her. Having agreed that the plaintiff walked on the right side of the aisle, she was then asked how it was possible for the plaintiff to slip from the patch in the middle of the aisle as depicted in her rough diagram. She testified that the drawing was not quite correct and that she should have made the patch a bit bigger. She tested the area where she thought the plaintiff's feet would have slipped and the aisle was not that wide.

[69] She was asked whether she tested more or less in the centre of the aisle and she answered that it was about the spot where she tested. When it was put to her that the area she tested was not the same as the area that the plaintiff had been walking, she stated that as the plaintiff went around the edge she did go out a little bit, she did not stay right next to the shelves. It may be that the whole area was wet; where she walked right next to the shelves may also have been damp. She had tested just about where the spot she drew was but that did not mean that that was the only spot that was damp. She tested that little spot because there were people all over the rest of that area.

[70] She did not see the skid marks the plaintiff referred to in her letter to the defendant. She stated that it could be the plaintiff's imagination that there were skid marks. She agreed that it would actually be extraordinary for someone to push a mop right down the centre of the main aisle in a busy area, especially if they did not have a warning sign. She agreed that, logically, it would make more sense if the female cleaner was carrying a broom through the store than pushing a wet mop.

Defendant's case

[71] Mr Edward George Schwartz and Mr Jonathan McMillian gave evidence on behalf of the defendant. Mr Schwartz testified that he presently worked at the defendant's family store in Fish Hoek as a senior receiving manager. He worked at the Tokai supermarket between 2006 and 2008 and was there for several years before. He was employed as a store manager when the plaintiff fell on 13 April 2008. He viewed the security camera video of that incident and noted that he appeared in the video several times. He was on the floor assisting customers and to see to it that things were running properly. The manager's office was along the main corridor.

[72] As he was patrolling around on the day in question and checking things like stock lying around, somebody approached him and told him that one of the customers had fallen in aisle number five. Relevant to the incident, in the video he appears at 13:57:43 which is after the plaintiff's fall. At 13:58:37 to 13:59:10 he went to till number twelve to assist a customer that had a problem. At 13:59 he appears to the right of a wheelchair. On the left of the wheelchair is the assistant manager, who was in the same position on duty as the store manager, Mr Sean MacKay. Mr Schwartz and Mr MacKay helped the customer to get into the wheelchair. Mr Schwartz bent down and to check the floor. He asked the customer what actually happened and she mentioned to him that she slipped, that the floor was wet. It was part and parcel of his duty to check and see whether the floor was wet. He felt the floor with his hand and it was bone dry. He confirmed this to her and she stated that it must then have been something else that she slipped on. When the plaintiff was picked up, he checked if it was wet underneath her, just to make 100% sure. On this second inspection, he did not notice anything. Mr MacKay, who was the man on the left of the wheelchair, also confronted the plaintiff and asked her what was wrong. Mr MacKay also went back to go and check the floor himself. Mr Schwartz was standing behind him. Mr MacKay wheeled the plaintiff away with the wheelchair. After they had left Mr Schwartz came back to check if it was not

rice or something else that may have caused the fall, but there was nothing on the floor. He knew he had to issue a report on this incident. When he went out of the view (that is, of the video), he just browsed around to see if there was something that he might have overlooked.

[73] The cleaners were contracted by the head office on a two-year contract and if they performed well their contract would be extended. They were not the defendant's employees. They wore specific uniforms with a Zama Zama logo to show that they were employed by that company. There were five Zama Zama employees on the day of the incident (on different shifts). Two cleaners started in the morning at 7.00 and their supervisor at 08.00. Two other staff members would start at 14.00, relieving the other two who then leave at 15:00. Their supervisor left at 17:00. The two staff members' job description was to make sure that the floors were cleaned, that the toilets, the backup areas, the canteen, the manager's office and the front line areas were mopped. They had to make sure that everything was clean before the store opened. The crew that started in the afternoon worked until 20:00. They followed up the same duties as the earlier cleaners and made sure that the store was clean and that there were no spillages by customers and they were also called to clean up. Occasionally they would use an extra man on duty when required, for instance to clean the men's toilets if the female cleaners could not go in.

[74] When the store opened, two cleaners and a supervisor would be on duty. They would not operate on the shop floor; they got called if there were issues. There was one person walking around the store to see if everything was in order. At 17:00 the supervisor would go off duty and two cleaners would be in the store until closing time. The cleaners knew exactly what had to be done. They were trained for that by Zama Zama. They used a broom with a sweeping scoop, (which was a pan clipped onto the broom). They also used a mop, which was horizontal with long hair hanging on it. When they did the mopping, they had a four wheeled bucket with water where they would squeeze the mop to dry.

[75] They carried warning signs at all times when they mopped to indicate to customers to be aware that the floor was wet. If the defendant had issues with the cleaning staff they would take it up with the supervisor on duty. When the store closed and all the customers had gone, it would be the duty of the cleaners to clean the store in preparation for the next day. Zama Zama cleaners were very competent.

[76] The female cleaner in the video carried a scoop and the male cleaner carried a mop. The object he carried was definitely horizontal with strands hanging on it. The object carried

by the female cleaner was a broom because it did not have the horizontal looking feature. Brooms used at the Tokai supermarket had long handles with a plastic clip on.

[77] In cross examination by Mr Seale, he testified that the cleaners would be called over the microphone, if there was a spillage. They would use water to clean dirty marks. They mixed it with chemicals to clean spillages like oil. They would mop directly with a wet mop on the floor. They dried the mop before use on the floor and used the water to clean it. If they wet the floor, they had to put up signage. No worker aimlessly wondered around. They were trained not to drag wet mops on the floor. If they walked around with a mop, it would be bone dry. The broomsticks were covered with an off-white shiny plastic. The mop had a wooden handle in a pinewood natural colour. The mops had handles longer than a broom. He knew that because when the cleaning equipment came to the store, it was checked by the managers. The uniform of the cleaners on the photographs belonged to Zama Zama. Cleaners were employed by Zama Zama at the Tokai supermarket for up to two years. He could not confirm whether employees were employed by Zama Zama for less than two years.

[78] A person packing on the shelves would be working for the defendant. The defendant's employees wore light blue shirts and darkish trousers if they were male. The female cleaner with a ponytail in the video was carrying a broom, because she was keeping it on the floor when she swept whereas they would normally keep the mop in the air so that it did not touch the ground. When sweeping a person would normally move forward, but when they mopped they would move backwards, making side to side movements.

[79] When he checked the floor, he put his hand down and rubbed on the place where the plaintiff indicated she had fallen just to see if there was anything sticky or slippery on it. He found it to be bone dry. He did not see anyone mopping in the intersection of aisle 5 and the corridor, either on the day of the incident or in the video.

[80] In cross examination by Mr Nel, he testified that the Tokai supermarket was bigger than the normal supermarket; it served a high concentration of customers. There were about twelve to fourteen aisles. The aisles were fairly long for a store of that size. The cleaning, security and trolley staff members fell under him and Mr MacKay was his senior. The Zama Zama supervisor was not visible on the video. The cleaners were fully trained, it was not necessary for them to be supervised by the defendant's managers; supervisors are there to ensure that cleaners perform their duties properly. There were normally three female cleaners

and one male, one who was the supervisor. He would not know where the supervisor would have been the time of the incident; she may have been on lunch.

[81] Mr MacMillan testified that he was employed as the chief accountant in the defendant's Western Cape Region. The Tokai supermarket was a store within the defendant's stable. During the period that the plaintiff fell, the defendant had a cleaning contract with Zama Cleaners trading under the name Moonstone Investments. The defendant outsourced its cleaning to professional cleaning companies. He referred to an agreement entered into between the third party and the defendant dated 1 December 2008. He confirmed that annexure "A" was an annexure to the agreement, and had columns detailing the names of defendant's stores, contract prices and periods. He was not the person who signed the contracts, he simply administered them, but the dates in annexure "A" would normally illustrate the starting of a relationship with the third party. Various stores are indicated in that Annexure. Next to the Tokai store the date indicated is 01 August 2007. This would have been a starting date for the third party to clean in the Tokai store. The next column of the annexure, next to the Tokai name, indicated the dates of 1 March 2008 to 31 August 2008, which would be the period within which the plaintiff's fall had happened. Under the column of "Contract Price", and during this period there is an amount of R24 808.09 indicated. That would have been the contract amount that was due and payable to the third party for the services rendered at the Tokai store. That amount was paid to the third party monthly.

[82] He referred to a general ledger which showed payment of an amount of R24 608.09 from the Tokai supermarket cost centre to the third party for cleaning services of April 2008, which is the same month the plaintiff slipped and fell. In terms of the written agreement dated 1 December 2008, the third party would supply the customer with the services as per prior quotation accepted by the customer, which would be incorporated into the agreement. The defendant could not find the quotation for the Tokai store. He referred to a quotation received in respect of another store, Eersterivier, which was alleged to be similar.

[83] The commencement date of the written agreement was 1 September 2008, but the agreement contained an annexure with dates preceding the commencement date. This showed that there was an agreement prior to the written agreement as indicated by annexure "A". The defendant, however, could not find a written agreement to that effect. He knew that there was an agreement, if not written then verbal; otherwise the defendant would not have paid the third party (for cleaning). The written agreement also stated that the contract

would continue on an evergreen basis, which meant it could continue indefinitely, terminable by either party on 90 days written notice, prior to the anniversary date of the contract.

[84] The quotation would include services provided by the third party. They paid the third party under one account for all the stores. Services rendered would be the same from store to store. The third party cleaners were very competent. Staff complement would differ from store to store. They employed professional companies to clean their stores. He referred to the third party's proposal to clean, dated 26 April 2007, which indicated compliance with the South African Bureau of Standards ('SABS') requirements and that the third party trained and developed its staff. He testified that the third party was tried and tested, had cleaned many of the defendant's stores and had received additional stores because of that. He confirmed that to the best of his knowledge the defendant was not able to provide any further details about the contract between it and the third party prior to the conclusion of the written agreement.

[85] In cross examination by Mr Nel, he stated that he was not involved in the conclusion of the contract. This would be done by the operations department, and he was in finance. He could not tell the Court what the terms and conditions were between the third party and the defendant, regarding the Tokai branch. He could not tell how many cleaners were covered by the amount of R24 808.09 and whether it included a supervisor. He could not state why it had taken so long for the insurers to be told that there was a third party cleaning company involved.

Third party's case

[86] The third party called Mr Conan Cole as a witness. Mr Cole testified that he was the managing director of the third party. Zama Cleaning Services was the former trading name of Moonstone Investments. He had about 22 years' experience in the cleaning industry. The third party had about 50 clients in its books and employed 600 cleaning staff in the Western Cape alone.

[87] The third party looked after commercial, industrial and retail types of businesses, such as the defendant. Tokai was out of his area. They worked for seven of the defendant's stores at present. The third party started working for the defendant in 2005, but he was not sure when it started cleaning at the defendant's Tokai branch.

[88] The third party changed the staff compliment once every four years. It had a 24% staff turnover in the business per annum. The average could be three to four years. They had an induction programme regarding the cleaning methodology, on how to clean different surfaces, followed by extensive and continuous on the job training. Depending on the requirements of a site, there would be general cleaners and a supervisor or a team leader who would co-ordinate events on the site on a daily basis with regards to cleaning standards. The supervisor worked as a cleaner in addition to supervising the staff.

[89] He was aware of the incident that occurred in 2008. The staff members that were employed at that time were no longer in the third party's employ. He did not know where those people were. He had made efforts to trace them and even offered a reward of R5000 amongst the staff members to try and locate these individuals, but had been unable to find them.

[90] The staff in 2008 were dressed in a company uniform, which would be black with a Conti suit top, a yellow band on the chest and Conti suit bottoms with a yellow stripe on the outside of the pants. There was small company logo, "Zama Cleaning", at the front and a big print logo at the back of the uniform. The third party kept records for a period of five years, as prescribed by law, and then discarded them. It did not have records of the staff members employed at the time of the incident. The third party had never appeared in Court in matter like this before. Annexure "A" of the written agreement commencing on 01 September 2008, was a pricing schedule for work done by the third party at a number of the defendant's stores. The third party had worked for the defendant from at least 1 March 2007.

[91] Before September 2008 when the written agreement commenced, the contractual relationship between the third party and the defendant was a verbal one. Therefore during April 2008, at the time of the incident, there was a verbal agreement between the third party and the defendant. He could not say what "1 August 2007" stood for in annexure "A". It could be a starting date or some other change in the business. The column indicating an increase represented a legislative labour increase due to staff in September of every year. The figures were largely determined by the number of staff members on site.

[92] The female cleaner appearing in the video footage was the third party's cleaner, wearing a black uniform (with a pony tail). She carried a broom and a dustpan. Another person (the male cleaner) carried a mop. The distinguishing feature between a broom and a

mop was that a mop had a horizontal clip and hair hung down that horizontal clip. It had a wooden stick which was traditionally longer than a broomstick.

[93] The female cleaner appearing in the video clip was carrying a broom because there were two stabiliser bars at the end of the broom handle which stabilised the broom head. The broom had a black V at the bottom which was a clasp that fitted over the handle and then secured itself onto the wooden part on top of the broom, the bristle holder.

[94] As part of the scope of their work, the cleaners would move around the floor of the shop on a continuous basis to pick up papers, debris and look for things that may need cleaning. Mr Cole was informed about the plaintiff's claim when they received the third party notice in early 2015.

[95] In cross examination by Mr Nel, he testified that he did not know why his company was never notified by the defendant that it received a letter of demand and a summons. This was the first claim they have had in their company. Records such as payroll registers, correspondences and quotes from 2008 would have been destroyed by 2013. The third party notice was sent to its insurance company upon receipt. The insurance company is dealing with this case. The company (Zama) changed its name to Moonstone Investments a few years ago. He was not privy to the discussions between the plaintiff and the defendant, prior to the receipt of the third-party notice. He was neither called to any meetings nor received any correspondence from the defendant. It was put to him that the female cleaner in the video footage who was making side to side movements was carrying a mop, to which he disagreed and said a person working with a mop worked in reverse, moving in a figure 8 motion backwards, whilst with a broom, he or she moved forward. With a mop, the implement itself would be moving from left to right. A person would be walking backwards, because if they mopped forward they would be walking over the patch that they had just mopped. If they were working with a mop, they would always walk in reverse.

[96] A broom was pushed forward from left to right to keep the dirt in the path of the broom. The reason one went from left to right was to cover a wider area from left to right to reduce the cleaning time and make it more effective in a large area. The purpose of the scoop was to collect the dirt that was swept up. The sweeper would pile the dirt in a certain area where the operator with a scoop was. The manner in which the female cleaner in the video used the instrument made sense to him, because dirt would have been moved to a particular point to be collected.

[97] A double bucket system was used for pre-opening standard cleaning, before the store was opened for customers and if there was a very large spillage one would call for a bucket and a ringer, but mops were used to spot mop. Buckets were not just carried around in a busy store. They would be stationed somewhere and called for on request. The mop carried around by the male cleaner in the video was more than likely dry. If it was needed to clean a sticky spillage, one would just wet that little spillage with a spray bottle or rub it hard with a dry mop. Cleaners walked around with dry mops on the floor to allow for maximum absorption if there was a spillage. A wet mop would be used when, for instance, there was stickiness on the floor. When a cleaner was called up via the PA system to attend to a particular spill, they would carry the wet floor sign with them and position it at the spill. They would continue to manage the spill from the personnel perspective until it was cleaned up. A number of factors would determine how quick the floor would dry. Those would be humidity, the volume of the spill, ambient temperature of the surface below the tile and the airflow. It was not possible to determine how quickly a damp mopped area would dry. If there was moistness on the floor, there would be somebody supervising that area. A moist area was not left unattended. The cleaners were trained. A team leader was a liaison between them and the defendant. If the team leader (or supervisor) was absent from the floor, one of the cleaners was trained as a second in charge. Smaller stores had no supervisors. Tokai supermarket was a medium-sized store. He was in charge of the operation to try and trace the cleaners on the floor at the Tokai store on the day of the incident. He physically made phone calls to cell numbers he thought were relevant; to no avail. The managerial team from that time was no longer in his employ; he asked his executive team to assist, right down to the cleaners. He did not employ a tracing agent to trace Nikita Gouws. He thought that should be done by the attorneys.

[98] In cross examination by Mr Crowe he testified that cleaners were taught how to mop in reverse. Mopping forward meant a person would walk on the wet area they had just cleaned and then they would have to clean it again. If someone mopped forward it would be against their training. He admitted what had been pleaded by the defendant in relation to the third party, namely that the third party employed the cleaners and a supervisor who was in control and supervised the cleaning staff it placed at the Tokai supermarket. He, however, mentioned that the word "supervisor" should be corrected to read "team leader". In further cross examination by Mr Nel, he denied that the reference to a supervisor (as read from the defendant's amended plea) sounded more like a dedicated supervisor than a team leader. He

testified that the cleaning staff in 2008 at Tokai supermarket were employed, deployed, paid and trained by the third party.

[99] In re-examination he testified that one could not tell from the video footage whether one of the cleaners was a supervisor by what they were wearing. When dirt was swept from side to side with a broom, it stayed at the head of the broom and got collected.

Discussion

[100] It makes more sense, in my view, to first deal with the issue of whether delictual liability has been established in this case. If it has been found to exist the next logical question to determine would be who bears the risk of liability between the defendant and the third party. If the third party is found to have been negligent, whether jointly and severally with the defendant or individually, then the issue of whether the claim against it had prescribed, prior to it being served with a summons, would have to be determined.

Negligence

[101] The test for the existence or otherwise of negligence was expressed in the oft quoted case of *Kruger v Coetzee*[6] where Holmes JA said the following :

> "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 fifty 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."

[102] The plaintiff bears the onus of proving such negligence on the balance of probabilities. In some situations where the plaintiff is not in a position to produce evidence

[6] 1966 (2) SA 428 (A) at 430 E-H

on a particular aspect, the evidentiary burden is placed on the defendant to demonstrate what steps it had taken to comply with the standards to be expected. In this instance less evidence showing a *prima facie* case might suffice if the matter is uniquely in the knowledge of the defendant. The onus however remains with the plaintiff. (See *Monteoli v Woolworths (Pty) Ltd*[7]).

[103] Cases of customers slipping and falling in shopping malls and supermarkets have been dealt with in numerous matters before our Courts. In a number of those cases the substance that caused the fall was firmly established or the facts from which inferences could be drawn proven. In this case, however those matters are not as straightforward.

[104] Perhaps one of the cases with the closest facts to the present matter is that of *Avonmore Supermarket CC v Venter*[8]. In that case the respondent, who was shopping with her colleague, Ms Loumeau, at a supermarket owned by *Avonmore*, slipped and fell on a damp floor. She sustained bodily injuries and consequently instituted a delictual action for damages against the appellant. The trial court concluded that the sole cause of the respondent's fall was the damp floor and that the appellant had failed to give adequate notice to its customers warning them of the potential danger. It found that the appellant was liable as it exercised full control over the cleaners and no acceptable evidence had been presented to suggest that it had indeed contracted with DBU Cleaning Services CC ("DBU"). Evidence had been adduced by the respondent and her colleague Ms Loumeau, that she was about two metres into the aisle when she slipped and fell. She saw a sign indicating that the floor was wet, but it was on the far side of the aisle. There was a cleaner in close proximity to that sign. The floor was wet and the respondent surmised that the floor must have been wet on account of the cleaner in the vicinity. The evidence on behalf of the appellant was that it had conducted a routine cleaning operation. Its witness, Mr Slater, testified that a male cleaner, who had since died, had recently mopped the area where the respondent had fallen. He stated that he was at the butchery section when he saw the respondent. She was alone and when she rounded the corner entering the aisle she slipped and fell. An issue of importance in that case, which is in dispute in this case, was the testimony of Mr Slater that when he went to the respondent's assistance, the floor was damp. It was common cause that he arrived later.

[105] Regarding the inquiry posited in *Kruger v Coetzee* supra, there was no doubt in the *Avonmore* case that the reasonable possibility of a person slipping and falling as a result of

[7] 2000 (4) SA 735 (W) at 742 C-G
[8] 2014 (5) SA 399 (SCA)

the damp floor was foreseeable. That was conceded by Mr Slater, the witness of *Avonmore*, in his evidence. It was then found that *Avonmore* was obliged to take such precautions as were reasonable to guard against the eventuality.

[106] The court found that the appellant's conduct caused the danger in that case, in that the routine cleaning operation was done during a busy period and the cleaner left behind him a damp floor. In the court's view the cleaning operation should have been conducted in such a manner that the cleaner ought to have worked on a small area and ensured that the area was dry before moving on. That would not have placed an onerous burden on him or his supervisor. This routine cleaning operation created a potential hazard to customers and in particular the respondent in that case. It was found that the appellant had a duty to regulate its conduct in order to minimise or eliminate the risk of harm. The court accordingly concluded that the negligence had been established.

[107] There are a number of similarities between the present matter and *Avonmore.* The plaintiff was with her friend, Mrs Garrard, as in *Avenmore,* who also walked behind her. Mrs Garrard was the first one to attend to the plaintiff, according to her evidence. She and the plaintiff stated that they saw a person carrying a mop within close proximity of where the plaintiff fell (although the plaintiff said she saw two). The difference between this case and *Avonmore,* however, is that it was accepted by *Avonmore* that the floor was damp and that it caused the respondent to slip and fall. Negligence was therefore indisputably established. Similarly in the case of *Gordon v Shoprite Checkers (Pty) Ltd and Another*[9] where a plaintiff, who was wearing shoes with rubber soles, slipped and fell on a floor of a supermarket while headed towards the fridge to buy cool drinks. When she stood up she noticed that her pants were wet and she noted that the substance that caused her fall was colourless. She saw a person with a mop in hand in the next aisle. The plaintiff drew an inference that the water must have come from the fridges. She saw someone with a mop standing and talking. Crucially, in that case, it was put to the plaintiff that the person she saw with a mop was placed there permanently to deal with a constant leakage from the fridges. A supervisor also checked the area every hour to check that no water or moisture was deposited on the floor. In that case there was no need to speculate as to the source of the water. It was unavoidable but to infer, based on the probabilities that the plaintiff fell because of the water that originated

[9] (32665/2010) [2014] ZAGPPHC 773 (26 September 2014)

from the fridges that were leaking constantly and which were close to where the plaintiff intended to buy her cool drink.[10]

[108] Another important case is that of *Probst v Pick 'n Pay Retailers (Pty) Ltd*[11] in which a shopper unexpectedly put her foot in a pool of cooking oil which had formed on the floor in front her trolley and which she had not noticed. She slipped, lost her balance and fell. She sustained certain bodily injuries which caused her to suffer damages. The court found at page 201, point number 9, that:

> "The evidence of the plaintiff's fall as a result of the oil on the floor, in circumstances in which she was not shown to have failed to take proper care for her own safety, justifies the inference, *prima facie*…, that the accident must have been caused by a negligent failure of the defendants, or their servants or agents acting within the course and scope of their employment, to perform their duty to take reasonable steps to maintain the premises in a reasonably safe condition."

[109] The evidence of the defendant's system of keeping the floor clean and safe during trading hours was found to be insufficient to displace that *prima facie* inference.

[110] In another case, *Brauns v Shoprite Checkers (Pty) Ltd*[12], a shopper fell on a slippery surface and hurt her right shoulder. She alleged that she fell and injured herself as a result of the negligent conduct of the defendant's servants acting in the course and scope of their employment and claimed damages from the defendant in consequence thereof. It was common cause that there was a sufficient quantity of water on the supermarket floor where the plaintiff fell to constitute a foreseeable danger to customers. The *diligens paterfamilias* in the position of the defendant would have foreseen and guarded against the reasonable possibility of the plaintiff slipping and falling on the quantity of water which had found its way onto the floor of its supermarket and injuring her in the process. Like anybody else who walks in a walkway where the general public not only has access but indeed is invited to enter, the plaintiff was entitled to expect that she would walk on it with safety.

[111] I take note of the fact that the *Probst, Brauns* and other matters were concerned with the danger created by spillages that went undetected. The focus there was on the adequacy of the system to detect and deal with spillages. In the present matter the plaintiff alleged that the hazard was created by the cleaner who mopped and left the area in which she fell, damp. Mr

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[10] At para 19
[11] [1998] 2 All SA 186 (W)
[12] 2004 (6) SA 211 (E)

Nel was sure to point that out in his argument. According to Mr Nel, this is not a classic spillage case. He submitted that the basis of the plaintiff's claim was that the cleaner may have spotted something unclean on the floor, mopped it, thereby introducing a new danger being the slippery floor; the cleaner then failed to take reasonable care to protect shoppers against this newly created danger.

[112] The first inquiry therefore, in this case, is whether the plaintiff fell as a result of moisture or water on the floor (caused by the cleaners). In other words it is important to determine whether or not there was such moistness or water on the floor as alleged by the plaintiff.

[113] In a full bench decision of this division, *Gilson v Shoprite Checkers Ltd*[13] Cleaver J said the following:

> " [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
>
> …
>
> [18] ...In this connection it is necessary to point out that since the plaintiff bore the onus [footnote omitted], 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.
>
> …
>
> [20] ...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.
>
> …
>
> [26] The trial judge concluded that in the light of the evidence given by Day, De Waal and Ruiters [on behalf of the respondent] 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.

[13] (A 69/2008) [2008] ZAWCHC 330 (25 August 2008)

> 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."*' [14] [Underlined for emphasis]

Has the plaintiff been able to show that the floor was moist/damp?

[114] The Court must look at all the evidence that has been presented to determine the cause of the fall. Mr Nel submits that, on the facts before the Court, the most reasonable inference that the Court should make is that: (1) the floor was moist; and (2) the moist slippery spot on which the plaintiff fell was caused by the cleaner using a wet mop.

[115] Looking at the plaintiff's evidence on its own, it is clear that she neither saw nor felt water or moistness when she fell. She testified that as she turned her feet slipped out from underneath her. She could not independently say what caused her fall. The plaintiff was told by Mrs Garrard that the floor was moist. All the plaintiff could say was that she fell because the floor was slippery. She saw a person (or two) standing to the left carrying a mop and assumed that the person must have been mopping where she fell - and her assumptions were confirmed by Mrs Garrard who told her that she felt the floor and it was damp and wet. It must be accepted that on its own, the plaintiff's testimony is not very useful in answering the key question as to what caused her to slip and fall.

[116] It is therefore imperative to analyse Mrs Garrard's evidence, as well as the alleged presence of cleaners carrying mops and whether an inference can be drawn that they mopped in the area where the plaintiff fell, thereby creating a hazard without warning members of the public about the damp floor.

[117] In regard to the cause of the fall, Mrs Garrard stated in her examination in chief that she looked to where the plaintiff would have slipped and saw "*a girl standing with a mop on the corner of the aisle. There was a gentleman on his haunches on the floor*." She tested the floor with just one foot and thought *"ooh that's slippery*." In cross examination she stated that there was no water visible nor was it shiny; she later added that before she put her foot down, she bent down and saw it was shiny. Mrs Garrard was quizzed during cross-examination as to the spot she investigated. With reference to her rough sketch she initially

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

testified that she tested the spot at the feet of the plaintiff. It must be noted that the patch from the drawing appears to be at the centre of the aisle. When challenged about the fact that that could not have been the area that the plaintiff fell from, as the spot where her feet were was where she landed, Mrs Garrard stated that her drawing was not quite correct; the patch should have been a bit bigger. She then stated that the plaintiff did not stay right next to the shelves, she went out a little bit. She added further: "*it may be that the whole area was wet, where she walked right next to the shelves may also have been damp*." She went on to say she tested just about where the spot she had drawn was, but that that did not mean that that was the only spot that was damp; finally she stated that she tested a little spot because there were people all over the rest of that area.

[118] There appeared to have been acknowledgements during this exchange between Mr Seale and Mrs Garrard that the area she tested may not have been the same spot the plaintiff had been walking on. Mrs Garrard's evidence on this issue gave an impression of a person who was not certain as to which area of the floor she tested, upon being presented with possible inconsistencies between her sketch plan and the evidence of where the plaintiff was walking and slipped.

[119] In my view the lack of clarity brought by Mrs Garrard in her evidence as to which spot she actually tested did not assist the plaintiff's case at all, because it did not bring clarity as to whether or not she tested the place where the plaintiff walked, which was the right hand side of the aisle. Even assuming that the entire area which was at the corner of aisle number 5, intersecting with the main corridor, was damp, it was evident from the video that many people walked in the main corridor close to aisle 5 but none of them experienced any difficulties with walking. It is also clear from the video that a number of people came out of the aisle before the plaintiff fell and none of them seemed to have experienced difficulties. I accept that one cannot conclude solely from this that there was no dampness in that area of the floor.

[120] What compounds the difficulties between the evidence of Mrs Garrard and the plaintiff's, is the plaintiff's correspondence that she wrote to the management of the defendant, as well as to Mrs Ackerman, stating that she slipped on some water on the floor. These letters were written as if the plaintiff had direct knowledge of what had caused her fall. It only becomes apparent later that in fact she was told by Mrs Garrard that there was moistness on the floor and that what was written in her letters must have been what Mrs

Garrard told her. The amended particulars of claim also referred to water. Be that as it may, this was contradicted by Mrs Garrard who stated that there was no water on the floor. I understand that water is fluid, but it must be accepted that whilst water is liquid that can cause moistness, there is some difference between a person specifying what kind of liquid they fell from and making a general allegation that they fell on a damp floor. Dampness can be caused by a number of things. This was conceded.

[121] The plaintiff also mentioned skid marks in her letter to the defendant, which Mrs Garrard stated were not present. That takes me to the presence of cleaners with mops next to where the plaintiff fell. Both the plaintiff and Mrs Garrard alleged that they saw a person / persons carrying a mop/s.

[122] Starting with the plaintiff's observations. First, in her evidence in chief, the plaintiff testified that after her fall, the first thing she became aware of was that "*there was somebody or one or two people with mops standing to my left, I saw briefly the mop*." She appears not be certain as to how many people she saw with mops. Later in her evidence in chief she moved from seeing "people" to seeing "somebody" with a mop.

[123] In cross examination by Mr Seale it first appeared as though the cleaner the plaintiff had seen was a female, as she referred to a 'she", but then as the questioning continued she referred to the cleaner as a "he" a few times, as if she had seen a male cleaner and that he was on her left, not at her feet but at the top of the gondola from where she had come. Initially, the cleaner was described to have been on her right. This was not corrected as being a mistake or clarified. Apart from these internal contradictions in the evidence of the plaintiff, the plaintiff had mentioned during her evidence in chief that the evidence she gave would be coloured by the pain and she may not be wholly accurate in terms of the details.

[124] The plaintiff had also stated in a letter written to the defendant that there were two persons with mops. Her evidence was further contradicted by Mrs Garrard's evidence with regard to the number of people with mops, the gender of the person with a mop and where that person was standing. Mrs Garrard stated that she saw a female cleaner at the corner of the aisle. In her drawing the cleaner is standing at the corner of the aisle, in the main corridor, next to the plaintiff's feet. The male person she saw was on his haunches as if doing something on the shelves and was not carrying any mop. As the plaintiff's head was on the right hand side, if the cleaner was standing where Mrs Garrard said she was, it is not clear how the plaintiff would have been able to see the person. Secondly, if the person was on the

right hand side as stated by the plaintiff initially, that would be in contradiction with Mrs Garrard's evidence.

[125] The plaintiff, Mrs Garrard, as well as Mr Schwartz did not see the cleaners mopping before the plaintiff fell. The plaintiff seeks the court to infer from the video footage, firstly, that the cleaners appearing therein were carrying mops, in particular the female cleaner and that her movements indicated that she was mopping, shortly before the fall, the area the plaintiff fell on. Alternatively, that the male cleaner seen carrying a mop and walking into the aisle opposite where the plaintiff fell and then out of the aisle where the plaintiff fell, must have been mopping where the plaintiff fell, shortly before then.

[126] What is observed in the video footage is a male cleaner carrying a mop (this is common cause) entering an aisle at 13:53:18. He then comes out of the next aisle (where the plaintiff fell) at 13:54:39 still carrying a mop facing down (but not touching the floor). What he was doing with the mop is out of sight but as he emerges out of the aisle, he exchanges the mop from one hand to the other as if he was doing something with it, but it is difficult to tell from the footage exactly what he was doing or whether the mop ever touched the floor. A female cleaner appears at the corner of the aisle intersecting the main corridor at 13:55:32 and makes some movements with the object she is carrying, which according to the defendant and the third party is a broom, appearing to be cleaning. She then walks up the main corridor and comes back again, making left and right movements with the item she is carrying. Shortly before she reaches the corner of the aisle again, there is commotion which is said to be the plaintiff's fall at 13:55:50.

[127] As regards the mopping by the male cleaner, it is hard to tell from the video footage that he indeed was mopping that area. He may have been mopping there, but without facts it is difficult to draw that inference. I sympathise with the plaintiff in this regard, but I would be taking a long shot if I make that conclusion, more so, because I would be relying solely on inconclusive video footage.

[128] When it comes to the female cleaner with a pony tail, extensive evidence was given by Mr Cole and Mr Schwartz as to why the object carried by that cleaner could not have been a mop. According to them, the distinctions between the mop and the broom were the length and colour of the sticks, the horizontal and v-shaped clips, and the movement made by the cleaner, who was moving forward. If she was mopping she would have been moving in reverse for a number of reasons, including the fact that she would step on the very same spot

she had cleaned if she mopped moving forward. It was also not safe to do so. Furthermore, if driven forward, the head of the mop tumbled up and had no effect on the floor. Mr Cole was adamant that the staff members were trained to mop in reverse and to sweep forward. It is also noteworthy that if the female cleaner had been mopping, she would have been doing so in the main corridor, which was a busy section of the shop. Furthermore, she appeared to be cleaning at the top of the corridor, more to the middle and corner of the aisle. Whilst appearing close to the corner of aisle 5 at some point, she did not go in the aisle. I would imagine the plaintiff would have slipped in the aisle itself, on the right hand side of the aisle towards the end. I am not able to conclude on the balance of probabilities that the female cleaner was, firstly, carrying a mop, which secondly, she used in the area where the plaintiff fell.

[129] As to where she went to stand after the fall, the video did not show, but she does pass the plaintiff who is lying on the floor on her left hand side and then moves out of the view of the camera.

[130] As to the accuracy of the evidence that the female cleaner had a ponytail, after having positively testified that the cleaner she saw had a ponytail, Mrs Garrard went on to say that she may have been influenced by the video on that aspect, she could not honestly say that on the day she saw the cleaner, she had a ponytail. This statement colours the accuracy of the evidence on the other aspects as well, particularly on the carrying of the mops. I say this also because the female or male cleaners were not noticed by the plaintiff and Mrs Garrard at the aisle or corner thereof, mopping, prior to the fall. I understand that the plaintiff was focusing on the shelves, but Mrs Garrard was merely following the plaintiff.

[131] It is a great pity that there was no video footage depicting the entire aisle prior to and during the plaintiff's fall. Apart from correspondence by Mr De Villiers, the then attorney of the plaintiff, showing that a CD containing footage, was asked for and delivered sometime in 2010, there does not seem to have been any robust or active pursuance from plaintiff's attorneys requesting further footage apart from a question regarding the existence of security cameras raised in a minute dated 2 August 2016. The defendant's attorneys' reply in a minute dated 12 August 2016 was that the defendant had advised that it did not have any footage other than the 18 minute clip that had been made available. If there was request done earlier than that, I was not directed to such. It does not appear that any procedural remedies available to the plaintiff were pursued prior to the commencement of the trial, to compel discovery, if it

was believed that there was further footage not discovered by the defendant. Whilst Mr MacMillan was not able to state why only the 18 minute video footage focusing on a small part of the main corridor and the aisle was made available, he testified that their shop floors were not 100% covered by cameras. He further commented that it would be difficult to go back to 2008 when a request was made in August 2016. It is therefore difficult to infer, as Mr Nel would like the Court to do, that the footage depicting the rest of the shop floor was deliberately withheld by the defendant because it would have been incriminating. In my view more should have been done, by the plaintiff's legal representatives shortly after the fall, or in 2010 when the CD was delivered to Mr de Villiers, or soon thereafter to establish if other footage existed.

Conclusion

[132] Based on these reasons, I am unable to find that the plaintiff has been able to discharge her onus that her fall was caused by a damp floor created by the cleaner(s). The evidence of the plaintiff was not sufficient to establish the onus that rested on her. It was for her to establish that the floor was damp where she fell, to make it reasonably foreseeable that a customer might slip and fall from moistness. As put by Cleaver J in *Gilson* supra, the mere fact that the plaintiff slipped is no evidence of negligence. Mrs Garrard's evidence, that she felt the floor with her foot, was challenged and she contradicted herself in cross examination and brought a lot of confusion on this aspect. I am also of the view that finding that either the defendant or the third party was negligent, on this evidence without more, would be ill-advised. That being the case, it is not necessary to go into the enquiry regarding the duty the third party and/or its employees had towards the defendant's customers. I am not unsympathetic towards the plaintiff's unpleasant experience. I however have to make a decision based on the evidence available and the applicable principles of the law.

[133] In view of my findings on the aspect of negligence, it is not necessary to consider the issue of who carried the risk of liability between the defendant and the third party and the subsequent question of prescription.

Costs

[134] That takes me to the question of costs. First I deal with the costs that stood over for later determination relating to the defendant's application to amend its plea. The defendant is of the view that the amendment was the run of the mill type of amendment and the plaintiff's opposition had no basis. The plaintiff argues that it was only in the replying affidavit that the

defendant gave sufficient evidence and documentary support regarding the identity and possible involvement of a cleaning company and the plaintiff was entitled to oppose the application until then. Clearly the amendment introducing the third party was an important one and has been proven to be such in these proceedings. It was indeed to the benefit of both the plaintiff and the defendant for the third party to be joined. For the defendant, because it had to show that it had contracted with an independent contractor at the time of the incident, to be absolved from any wrongdoing by the cleaners. It is so that the amendment was sought late in the day, but the question is whether the amendment was justified. It was, however, not unwarranted for the plaintiff to oppose the amendment as it changed the game altogether, in that a "different" party, who may have been found to have carried the risk of liability, was introduced. Indications that there would be proof of the existence of a contract between the defendant and the third party would have been a valid consideration and to the extent that more information on this came to light after the filing of the replying affidavit, I would suggest that that meant opposition was not altogether unmerited. Even though the amendment would have, in any event, succeeded if the application was heard, my view is that each party should pay its own costs in respect of the defendant's amendment.

[135] Insofar as costs for the point *in limine* and condonation application are concerned: both the third party and the plaintiff are to be criticised for the manner they handled the case; the plaintiff for failing to obtain leave from the Court prior to serving the notice on the third party and the third party for waiting until the commencement of the trial to bring its point *in limine,* which turned out to involve a substantial amount of argument that took a few days of the Court's time, having participated in pre-trial procedures and filed pleadings. I agree with Mr Crowe that had there been sufficient forewarning, the defendant might have stayed away and left the fight between the two parties, as it did not have much participation on the issue, particularly on the first two days of the hearing of the point *in limine*. As to the third day however, the matter was particularly postponed for the hearing of the plaintiff's condonation application, the defendant knew about this and attended. It further made submissions, to protect its interests. I would therefore not regard costs for that day as wasted costs *per se.* The defendant clearly had an interest as to the granting or otherwise of the condonation application, as borne out in its written submissions. However, if it thought that day would be a wasted day, then it could have stayed away. I do not think that the two other parties should pay its costs for that day.

[136] There is also an issue that concerns costs relating to the filing of defendant's rebutting heads and other heads which followed thereafter. These heads were unduly long and, as Mr Nel submitted, the rebutting heads particularly did not briefly deal with issues arising from the replying affidavit. They were close to re-arguing the issue of the existence of the contract and even longer than the main heads. I therefore do not think it would be just to order the plaintiff to pay for these costs and for those of the heads that followed thereafter. Other than what I have outlined above, costs should follow the result.

[137] In the circumstances, the following order is made:

1. The plaintiff's claim against the defendant and the third party is dismissed.
2. Costs shall be payable in the following manner:

   2.1 As regards costs of the application to amend the defendant's plea, each party is to pay its own costs;

   2.2 The plaintiff and the third party are to pay their own costs in regard to the third party's point *in limine* and plaintiff's condonation application;

   2.3 The plaintiff and the third party are to pay the defendant's wasted costs jointly and severally relating to the third party's point *in limine* and plaintiff's condonation application only for 17 and 18 August 2016 respectively;

   2.4 The plaintiff is to pay the remainder of the defendant's and third party's costs save for the costs relating to the heads of argument filed after the plaintiff's replying heads of argument dated 22 February 2017.

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N P BOQWANA

Judge of the High Court

APPEARANCES

For the Plaintiff: Adv. T J Nel

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For the Defendant: Adv. M A Crowe SC

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For the Third Party: Adv. M Seale

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