IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

REPORTABLE

CASE NO: 8897/16

In the matter between:

NICOLENE HOLTZHAUZEN	Plaintiff
and	
CENPROP REAL ESTATE (PTY) LTD	First Defendant
NAHEEL INVESTMENTS (PTY) LTD	Second Defendant

Coram: P.A.L. Gamble, J
Date of Hearing: 14, 15 & 17 October 2019
Date of Judgment: 10 December 2019

JUDGMENT DELIVERED ON TUESDAY 10 DECEMBER 2019

GAMBLE, J:

INTRODUCTION

[1] On the morning of Saturday, 1 June 2013 the plaintiff, a 37 year-old clerk employed by the City of Cape Town, visited the Goodwood Mall ("*the Mall*") in Voortrekker Road, Goodwood to draw money. On her way to ATM she slipped and fell

on the tiled floor inside the Mall and suffered a fracture to her elbow. She now seeks to recover damages arising from her injuries from both the management company in charge of the Mall and its owner. By agreement between the parties the question of quantum is to stand over for later determination and it is only the merits of the plaintiff's claim which require adjudication at this stage.

[2] It is common cause that at the time the first defendant ("*Cenprop"*) managed the shopping centre on behalf of its erstwhile owner, the second defendant ("*Naheel*"), and that the former was in control of the premises at the time of the incident pursuant to a management agreement concluded with Naheel. Cenprop had previously owned the Mall and after two changes of ownership between 2010 and 2013 it resided in Naheel's property portfolio.

[3] It is further common cause that Cenprop was required to physically inspect the premises on a regular basis and to attend to any hazardous situations which might imperil the use of the Mall by the public. To this end, when Cenprop owned the Mall it appointed a professional cleaning company, JKL Cleaning Solutions CC ("*JKL*"), to ensure the general cleanliness of the centre and, in particular, to clean any spillages which might occur. JKL stayed on as the company responsible for cleaning the Mall during the changes of ownership referred to.

[4] Cenprop further says that it contracted with a company known as Gabriel Protection Services (Pty) Ltd ("*Gabriel*") to provide security duties at the shopping centre. Part of Gabriel's functions are alleged to have included being on the lookout for potentially hazardous situations in the Mall which might compromise the

safety and physical integrity of shoppers and alerting JKL thereto where necessary. This would have included the presence of any spillage in the public areas.

THE EVIDENCE ON BEHALF OF THE PLAINTIFF

[5] The facts are relatively uncomplicated. It was midwinter and raining outside. The plaintiff testified that she had entered the Mall via the adjacent car park and walked through a set of double doors which were set back from the exterior of the building. In other words, it was suggested that the approach to the doors was covered by an overhang of about 8 metres. The plaintiff was accompanied by three children, one of whom was an 11 month old baby whom she carried cradled in her left arm.

[6] After walking through the entrance door the plaintiff said she headed toward the ATM and covered some 20 odd paces along a wide corridor between the shops when she suddenly slipped and fell on the floor, injuring herself in the process. Fortunately she managed to avoid dropping her baby whom she put down on the floor after she had fallen. The plaintiff testified that she noticed that the floor at that spot was wet to the extent that the exterior of her baby's nappy was damp when she picked her up again. The plaintiff also complained that her own clothing was wet after the fall.

[7] The plaintiff confirmed that when she walked into the Mall via the door from the parking area she noticed a bright yellow sign placed on the floor cautioning shoppers about the existence of wet floors: she described a bi-pod sign of the sort that one usually encounters in shopping centres bearing words cautioning about a

“Wet Floor”. She also said that she noticed that the floor was wet as she walked cautiously beyond the said sign towards the ATM.

[8] The plaintiff’s mother testified that she was employed at a supermarket in the Mall and that she arrived on the scene shortly after the fall, having been called by the plaintiff’s older daughter. There she found the plaintiff lying on the floor and she noted that the tiled surface was wet, she presumed as a result of rainwater. A wheelchair was brought and the plaintiff was taken away for medical treatment.

[9] On the Monday morning following the incident, the plaintiff’s mother said that, while on duty at the supermarket, she encountered the erstwhile manager of the Mall (Mr. Albert de Jager) and asked him whether he was aware of the fact that her daughter had fallen in the Mall the previous Saturday. She said that Mr. de Jager confirmed to her that he knew of the incident and that he had said to her that it was raining at the time and that was not possible to put up “Wet Floor” signs everywhere.

[10] Finally, the plaintiff adduced the expert evidence of an architect, Mr. Michael Bester, who testified that he had been involved in the design of various shopping centres over the years. Mr. Bester held the view that the tiles used in the Goodwood Mall were not appropriate for their intended application because they lacked sufficient non-slip qualities and suggested that he would have preferred a tile with a rippled finish on it. It was pointed out to Mr. Bester under cross-examination that a tile similar to that used in the Mall had been used in the N1 City shopping complex not far away and that this was a far larger shopping centre than the Goodwood Mall. He accepted that to be the position.

[11] Mr. Bester concurred with the expert called on behalf of Cenprop, Mr. Anthony Hockly, that the tiles in the Goodwood Mall were likely to have been dangerous underfoot when wet and Mr. Bester further agreed that it is possible that rainwater arising from the inclement weather outside could have been "walked in" to the shopping centre. Lastly, Mr. Bester held the view that the 1,8m wide mat placed at the entrance door was not sufficiently wide enough to prevent water from being transported further into the Mall on pedestrians' shoes.

THE DEFENDANT'S CASE

[12] The defendant called Mr. de Jager, Mr. Hockly and Mr. Jacques Wolhuter (the proprietor of Gabriel) to testify. Mr. de Jager is an experienced shopping centre manager and testified that at the time of the plaintiff's fall he was the manager of the Mall. He said that Gabriel had been appointed to perform security duties at the Mall and that JKL continued to assume responsibility for cleaning services. He referred the court to certain documents which had been drawn up by Gabriel and JKL respectively in which the terms and conditions of their purported appointments had been set out. The documents did not reflect who the "*client*" was nor were they signed by the counter-party because, said Mr. de Jager, his employer "*did not sign contracts*". He added that in June 2013 JKL was employed by Cenprop (*qua* centre manager) in terms of an oral agreement incorporating the terms of the unsigned written document already referred to.

[13] In the defendants' plea they jointly allege that Naheel appointed Cenprop to manage the Mall on a daily basis and that Cenprop, in the discharge of its obligations under such management contract, was responsible for engaging the

services of Gabriel and JKL. Both Cenprop and Naheel seek to rely on these contracts to avoid liability for the plaintiff's injuries, saying that they had appointed JKL as an independent contractor to attend to the cleaning the Mall.

> "*9.2…(T)he Defendants specifically deny that they and/or their employees' conduct was wrongful or negligent, either as alleged or at all. In amplification of the aforesaid, the Defendants' state:*
>
> *9.2.1 The Defendants appointed competent and/or professional contractors to maintain the surface area of the floors of the Goodwood Mall premises to, inter alia, ensure that the surface area remained clean and would not be dangerous to members of the public;*
>
> *9.2.2 The Second Defendant appointed First Defendant, a professional property management company and a competent and independent contractor, specialising in property management to, inter alia, assist in the maintenance of the premises, including the surface area of the floors of the Goodwood Mall;*
>
> *9.2.3 The First Defendant, inter alia, managed the premises on a daily basis, physically inspecting the premises on a regular basis, more specifically, after any contractor/s had done any work and maintained the premises in good condition;*

9.2.4 The First Defendant furthermore appointed a professional cleaning company, namely JKL Cleaning Solutions CC to, inter alia, spot clean daily any spillage in walkways with warning signage…

9.2.6 First Defendant furthermore appointed a professional security service provider, namely Gabriel Protection Services (Pty Ltd to, inter alia, call cleaning staff, if none is available, for spillage and litter in corridors;

9.2.7 In so appointing independent contractors, specialising in such tasks as carrying out the maintenance and cleaning of the premises and floors and checking of the surface area of the floors at the premises respectively, the Defendants took adequate steps to ensure the safety of members of the public and prevent the Plaintiff, in particular, from slipping and falling, as alleged."

[14] Mr. de Jager did not dispute the evidence of Ms. Holtzhauzen snr regarding his remark to her on the Monday morning and went on to explain the duties of the cleaning staff and the times at which that they were required to discharge same. Evidently between the hours of 06h00 and 11h00 there would have been three cleaners on duty and another two thereafter. Mr. de Jager confirmed the instruction to the cleaning staff to put up "Wet Floor" signs and confirmed the compliance by JKL with that instruction on the Saturday. He was not in a position to dispute that the floor was wet in the circumstances described by the plaintiff.

[15] Mr. de Jager further testified that it was his practice, when opening up the Mall every day for business, to conduct a physical inspection of the premises ("*a walk-about*") to ensure that all was in order. He said he would also liaise with the cleaning team from time to time if the need arose for them to attend to anything.

[16] Mr. de Jager also referred the court to signs posted up on the outside of the building warning shoppers that they entered the premises at their own risk. However, the photographs of these signs placed before the court reflect the owner of the Mall as "*St.Tropez Property Group (Pty) Ltd*" ("*St.Tropez Property*") and not Naheel. Furthermore, the photograph indicated that the sign mounted adjacent to the entrance where the plaintiff entered the Mall was hidden behind merchandise displayed by a hardware store (evidently a tenant of the Mall) and it was not readily visible to prospective shoppers. It appears that St.Tropez Property was the entity which owned the Mall after Cenprop and before Naheel.

[17] The evidence of Mr. Wolhuter was that he had been involved in the provision of security at the Mall since 2009. In 2013 he decided to set up his own company, hence the incorporation of Gabriel which fortuitously commenced service on the day the plaintiff fell. Mr. Wolhuter testified that on that day he was alerted to the incident in which the plaintiff had been injured. About five minutes later he hastened to the scene but when he arrived there he discovered that the plaintiff had already been taken off for medical treatment. Mr. Wolhuter said that at that stage the floor was dry but, in fairness to the plaintiff, it appears that this may have been as a consequence of the cleaners having mopped up the spillage which caused her to fall.

[18] Under cross examination by Mr.McClarty SC, counsel for the plaintiff, Mr. Wolhuter made heavy weather of it but eventually conceded that it was possible that the floors had been wet that morning as a consequence of the rain outside and water being trafficked into the shopping centre. He accepted, too, that the reason why the “Wet Floor” sign (which he had photographed on his cellphone) had been put up was precisely because the floors were wet due to the rain outside. The suggestion in argument by Mr.T.D.Potgieter SC for the defendants that there were diametrically opposed versions as to the state of the floor is therefore not borne out by the evidence.

[19] Finally, the defendant presented the evidence of Mr. Hockly regarding the suitability of the tiles laid in the Mall. He testified that as far as he was concerned the tiles were adequate to the conditions but he did concede that he was in agreement with Mr. Bester, that, when wet, the tiles would have been slippery.

[20] In summary then, the evidence establishes that on the morning in question the floor in this particular passage in the Mall was wet as a consequence of the rain outside. Importantly, there is no suggestion that the “Wet Floor” sign was put up to enable JLK’s cleaners to go about their daily work by, for example, cleaning and mopping the passageway. The question accordingly is whether, in circumstances where the tiles had a propensity to be slippery when wet, either Cenprop or Naheel was negligent in relation to the presence of water on the tiles at the place where the plaintiff fell and which caused her to fall.

[21] In addition to the aforesaid joint denial of liability the defendants plead that they are not liable to the plaintiff by virtue of the liability disclaimer notice already

referred to. Finally, there is an allegation of contributory negligence on the part of the plaintiff and a claim for an apportionment of her damages.

THE APPLICABLE LEGAL PRINCIPLES

[22] The approach to so-called "slip and trip" incidents in places frequented by members of the public was usefully summarised by Stegmann J in *Probst*[1].

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

[23] This approach was endorsed by the Supreme Court of Appeal ("*SCA*") in *Avonmore Supermarket*[2] as was the judgment in the Eastern Cape in *Brauns*[3] which followed *Probst*. In *Avonmore Supermarket* the SCA distinguished the following 2 factual scenario's which are important for understanding the *rationes* of these cases.

> "*[18] In Probst… the plaintiff had slipped on some cooking oil which had spilled on the floor. The court held that the defendant did not have a proper system to cover the shop floor at reasonable intervals and this*

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[1] Probst v Pick 'n Pay Retailers (Pty) Ltd [1998] 2 All SA 186 (W) at 200f

[2] Avonmore Supermarket CC v Venter 2014 (5) SA 399 (SCA) at [18]

[3] Brauns v Shoprite Checkers (Pty) Ltd 2004 (6) SA 211 (E) at 217H

had led to a situation in which it could take hours to discover a spillage. The defendant was found to be negligent and liable for the plaintiff's damages. In Brauns the plaintiff whilst shopping at the defendant's shop fell on a slippery surface on the floor. It transpired that there was a quantity of water on the floor at the place where she fell. It was established that the water had been there for half an hour or longer before the plaintiff fell, and that the defendant had been forewarned of the potential hazard to customers but had taken no steps to warn the customers of the water on the floor or to have the water cleaned up. The defendant was found to have been negligent and liable for the damages of the plaintiff.

[19] While the cases like Probst and Brauns are instructive, it is important to recognise that they were concerned with the danger created by a spillage that went undetected and the focus was on the adequacy of the system in place to detect and deal with spillages. In this case unlike in Probst and Brauns a voluntary task, namely a routine cleaning, was undertaken at the instance of the appellant. Alson[4] mopped the floor. Notwithstanding the measures outlined by Slater[5], Alson did not ensure that the area was dry and moved on. Nor did he place a warning sign for the benefit of the shoppers sufficiently close to the area concerned to warn them that it was slippery or wet.

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[44] A worker on the cleaning team.

[5] The store manager.

[20] I accept that there is a need to mop the floors of the store to ensure that it is clean. However, the manner of execution of that task is crucial. It is clear that the appellant's conduct caused the danger. The routine cleaning operation was done during a busy period. The cleaner left behind him a damp floor. That should not have happened. 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. In my view that would not have placed an onerous burden of him or his supervisor. This routine cleaning operation created a potential hazard to customers and in particular the respondent. The appellant had a duty to regulate its conduct in order to minimise or eliminate the risk of harm. I accordingly conclude that negligence has been established."

[24] The present case involves the situation described in ***Probst*** and it is therefore different to ***Avonmore Supermarket***. In the circumstances it is reasonable to conclude that the potentially dangerous situation which resulted in the plaintiff being injured occurred because of inclement weather outside of the store. These conditions, in turn, had the effect of shoppers transporting moisture/limited quantities of residual water into the Mall and as a consequence thereof the floor tiles became slippery when wet. This was known to Cenprop (and it seems on the basis of the joint plea, to Naheel too) and it was accordingly required to ensure that JKL put a system in place to minimize the risk which such moisture/residual water might pose to shoppers.

[25] According to the defendants' case that risk was dealt with by employing a practice in terms whereof Gabriel's staff were to be on the lookout for potential sources of danger for shoppers and, when such dangers arose, to alert JKL's staff as to the potentially hazardous situation. The latter would then be required to respond by putting up the "*Wet Floor*" signs and mopping the floor dry. I did not understand the plaintiff to take issue with, or criticize, this "*system*" put in place by JKL.

[26] It was submitted by Mr. McClarty SC that a hazardous situation arose at the Mall that Saturday morning because the patch of water on which the plaintiff slipped had not been mopped dry by JKL in circumstances where it was duty bound to do so. But JKL is not a defendant before the court and so the enquiry is limited to considering the conduct of Cenprop and its principal, Naheel in relation to the presence of such water. It was further contended by counsel that the existence of such residual water was foreseeable since it was raining outside the shopping centre and that Cenprop failed to take adequate steps to ensure that JKL complied with its alleged contractual duty and adequately addressed the situation. The cause of action is therefore based on an omission on the part of the defendants.

[27] Mr.Potgieter SC argued, firstly, that in the circumstances where Cenprop had engaged an independent contractor such as JKL to attend to cleaning and spillages, it had discharged its duty to the public to ensure a safe shopping environment and that the plaintiff's cause of action lay only against JKL. Reliance was placed on the reasoning of the majority in the SCA decision in ***Chartaprops***[6]. Mr.

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[6] Chartaprops 16 (Pty) Ltd and another v Silberman 2009 (1) SA 265 (SCA)

McClarty SC, on the other hand sought succour in the minority judgment of Nugent JA in *Chartaprops* and so consideration of that matter is necessary.

[28] *Chartaprops* similarly involved a fall in a shopping centre in which a shopper slipped on an unknown substance and suffered injuries. She brought suit both against Chartaprops (the owner and the entity under whose control the shopping centre in question resorted) and its cleaning contractor, Advanced Cleaning. The facts appear from the judgment of Nugent JA.

> *"[3] Advanced Cleaning had a system in place for cleaning the floors, the details of which are not important. It is sufficient to say that every part of the floor should ordinarily have been passed over by one or other of the cleaners in the employ of Advanced Cleaning at intervals of no more than five minutes. I think it is clear that the system, if it was adhered to, was adequate to keep the floors in a reasonably safe condition. It is also not disputed that Chartaprops itself kept a regular check of the contractor's performance. Its centre manager consulted each morning with the cleaning supervisor and personally inspected the floors of the shopping mall daily to ensure that they had been properly cleaned. If he encountered litter or a spillage he would arrange for its immediate removal.*
>
> *[4] But even the best systems sometimes fail. The learned judge in the court below found that the spillage had been on the floor for 30 minutes or more at the time it was encountered by [the plaintiff]. He said that that was 'a sufficiently lengthy period so as to constitute a hazard to*

members of the public and to the plaintiff in particular', that 'the employees of [Advanced Cleaning] failed to take reasonable steps to detect and remove [the hazard]', and that the cleaning system was accordingly 'not sufficiently adequate to detect and remove spillages with reasonable promptitude'. On that basis he concluded that Advanced Cleaning was negligent and liable to [the plaintiff]… and that Chartaprops was vicariously liable for the negligence of Advanced Cleaning."

[29] Nugent JA rejected the finding of vicarious liability for reasons which are not germane to this matter. Nevertheless, the learned Judge of Appeal went on to hold that it was possible to hold Chartaprops liable on the basis of its own duty, notwithstanding the absence of vicarious liability and notwithstanding its employment as an independent contractor.

"*[7] A defendant might nonetheless be liable for harm that arises from negligent conduct on the part of an independent contractor but where that occurs the liability does not arise vicariously. It arises instead from the breach of the defendant's own duty (I use that term to mean the obligation that arises when the reasonable possibility of injury ought to be foreseen in accordance with the classic test for negligence articulated in Kruger v Coetzee [1966 (2) SA 428 (A) at 430E-H]. It will arise where that duty is cast upon the defendant to take steps to guard against harm is one that is capable of being discharged only if the steps that are required to guard against them are actually taken. The duty that*

is cast upon the defendant in those circumstances has been described (in the context of English law) as a duty that is not capable of being delegated: 'the performance of the duties but not the responsibility for that performance, can be delegated to another'. Or as it has been expressed on another occasion, it is 'a duty not merely to take care, but a duty to provide that care is taken' so that if care is not taken the duty is breached."

[30] The gravamen of the minority judgment then is that, depending on the circumstances of the case, the use of an independent contractor may not necessary absolve a defendant from liability if such circumstances placed an additional duty on that defendant to avoid harm being caused – what was referred to as a non-delegable duty and which may be conveniently termed "*a higher standard of care*". Those circumstances would then impose on a defendant "*a duty to ensure that reasonable care is taken… Put differently, the requirement of reasonable care in those categories of case extends* ***to seeing that care is taken****."*[7](Emphasis added)

[31] Nugent JA went on to summarize the case before the court as follows.

"*[18] In a case like this one the parties stand in such a relationship to one another and in my view it indeed calls for the higher standard of care that I have referred to. A person who invites the public to frequent a shopping mall will be expected by members of the public to have ensured that the floors of the premises are reasonably safe and they will*

[7] See [13] and the foreign authorities there cited.

> *expect to look to that person if they are not. They are not ordinarily able to make their own assessment of the performance of the cleaners who might have been appointed to the task and, unlike the person in control of the premises, they are also not ordinarily able to determine where the fault of any failure of the cleaning system lies and who is responsible for that occurring. In short, they are entirely reliant upon the person in control of the premises to ensure that reasonable precautions are taken to keep the floor safe. It seems to me in the circumstances that it is reasonable to expect a person in control of a shopping mall to ensure that reasonable precautions are taken to keep the floors safe and is liable if those precautions are not taken by a person whom he or she has appointed to do so. That is how the duty was described in comparable circumstances in Probst."*

After citing the passage from the judgment of Stegmann J referred to in [22] above, Nugent JA commented as follows.

> "*The learned judge should not be thought to have said that it is enough to have an adequate system in place: I think it is implicit in what he said that the system must be adhered to."*

[32] And so, it is argued in this matter, that it was not sufficient for Cenprop to have engaged the services of JKL to keep the floors clean and have left it up to JKL to do the necessary. Cenprop had to go further and ensure that JKL performed its services properly in accordance with its (JKL's) own system. Significantly, there is no such allegation made *vis-à-vis* Cenprop in the particulars of claim.

[33] On the basis of the case as pleaded by the defendants and the application of the relevant authorities, Naheel is exempted from liability because it has appointed a duly qualified shopping centre management company in the form of Cenprop to attend to the daily running and maintenance of its asset: no allegation is made in the particulars of claim either that Naheel erred in its selection of Cenprop as the entity charged with control of its premises.

[34] Mr. McClarty SC pointed to the fact that Mr. de Jager knew that the floors inside the Mall generally got wet (and hence became slippery) when it rained and submitted that Cenprop (as the duly authorized management agent of Naheel) was thus obliged to ensure that JKL did its work properly, or as Nugent JA put it, it was required to see that care was taken by Cenprop. Once again, no such allegation is made in the particulars of claim.

[35] Mr. Potgieter SC, on the other hand relied on the judgment of the majority in *Chartaprops*. Ponnan JA, with extensive reference to the courts of England and Australia, declined to be drawn into Nugent J. A's categorization of a heightened duty to avoid damage on the part of the principal and pointed out that this notion had been found to be both case specific and without any legal foundation. Ponnan JA referred in this regard[8] to an article by Glanville Williams[9] where the following was said by the erstwhile doyen of the English law of tort.

> "*One of the most disturbing features of the law of tort in recent years is the way in which the courts have extended, seemingly without any*

[8] At [28] and [35] respectively.

[9] '*Liability for Independent Contractors'* (1956) Cambridge Law Journal at 180 and 198 respectively

reference to considerations of policy, the liability for independent contractors…

We need some sensible reason why, in any particular case, he should be liable where the injury occurs without his fault but through the fault of an independent contractor employed by him. No reason is furnished in the judgments under discussion. Instead, we are merely treated to the logical fraud of the 'nondelegable duty'."

[36] His Lordship continued as follows in his rejection of the concept of a non-delegable duty or a duty to ensure that care was taken by the independent contractor.

"*[36] Many of the statements explaining the nature and consequences of a non-delegable duty, have been criticised on the grounds that they offer no criteria distinguishing those duties which are non-delegable from those which are not. But apart from true instances of strict liability particularly where the duty is a statutory one, the distinction between delegable and non-delegable duties does not, it seems, really amount to more than the adoption of convenient headings for those cases in which defendants have been held not liable for the negligence of independent contractors and cases in which they have. However, the explanation given for the non-delegable relationship has been very general - no more than the existence of 'some element' that 'makes it appropriate' to impose on the defendant a duty to ensure that the safety of the person and property of others is observed - a duty not discharged merely by*

securing a competent contractor. The truth, according to Glanville Williams, 'seems to be that the cases are decided on no rational grounds, but depend merely on whether a judge is attracted by the language of nondelegable duty…"

[37] Rather, said Ponnan JA, the question of liability fell to be determined according to the ordinary principles of delictual liability.

"*[38] It must be accepted that the content of the ordinary common-law duty is to exercise reasonable care (and skill) or to take reasonable steps to avoid risk of harm to a person to whom the duty is owed. The degree or standard of care required varies with the risk involved. It follows that those who engage in inherently dangerous operations must take precautions not required of persons engaged in routine activities. This involves no departure from the standard of reasonable care for it predicates that the reasonable person will take more stringent precautions to avoid the risk of injury arising from dangerous operations. The concept of personal duty departs from the basic principles of liability in negligence by substituting for the duty to take reasonable care a more stringent duty - a duty to ensure that reasonable care is taken.*

[39] Traditionally, non-delegable duties have been held to apply in instances where, first, the defendant's enterprise carries with it a substantial risk and secondly, the defendant assumed a particular responsibility towards the claimant. Neither of which in my view is present in this case. As already stated, our 'ordinary' law of negligence

does take proper account of the presence of abnormally high risks and especial vulnerabilities. Thus where those features are found to be present our law expects greater vigilance from the defendant to prevent the risk of harm from materialising, for that according to our law is what a reasonable person in possession of the defendant would do. In the nature of a coherent legal doctrine, the response of our law in those circumstances should not be to impose strict liability or to resort to a disguised form of vicarious liability but rather to insist on a high standard of care. It follows that the correct approach to the liability of the principal for the negligence of an independent contractor is to apply the fundamental rule of law that obliges a person to exercise that degree of care that the circumstances demand…

[44] It is not easy to see why an exception should be specifically carved out allowing a person injured to recover from the principal in addition to the normal rights a person enjoys against the independent contractor posited as the effective cause of the wrong. In particular, it is difficult to see why the general policy of the law that the economic cost of the wrong should be borne by the legal entity immediately responsible for it, should not be enforced in this case. Furthermore, to shift the economic cost of negligent acts and omissions from Advanced Cleaning, the independent contractor with primary responsibility, to Chartaprops, because of the legal fiction of non-delegability, appears to me to be undesirable.

> *[45] There are few operations entrusted to an independent contractor by the principal that are not capable, if due precautions are not observed, of being sources of danger to others. If a principal were to be held liable for that reason alone the distinction between 'employee' and 'independent contractor' will all but disappear from our law. This plainly is not the type of case where it can be said that Chartaprops negligently selected an independent contractor or that it so interfered with the work that damage resulted or that it authorised or ratified a wrongful act. The matter thus falls to be decided on the basis that the damage complained of was caused solely by the wrongful act or omission of the independent contractor, Advanced Cleaning, or its employees."*

[38] The steps taken by Chartaprops *vis-à-vis* Advanced Cleaning seem to have been quite similar to those referred to by Mr. de Jager – regular personal inspection of the Mall and a requirement that Gabriel's staff be on the lookout for potential harm and an obligation to call in the cleaners.

> "*[46] Chartaprops did not merely content itself with contracting Advanced Cleaning to perform the cleaning services in the shopping mall. It did more. Its centre manager consulted with the cleaning supervisor each morning and personally inspected the floors of the shopping mall on a regular basis to ensure that they had been properly cleaned. If any spillage or litter was observed, he ensured its immediate removal. That being so it seems to me that Chartaprops did all that a reasonable person could do towards seeing that the floors of the*

shopping mall were safe. Where, as here, the duty is to take care that the premises are safe I cannot see how it could be discharged better than by the employment of a competent contractor. That was done by Chartaprops in this case, who had no means of knowing that the work of Advanced Cleaning was defective. Chartaprops, as a matter of fact, had taken the care which was incumbent on it to make the premises reasonably safe.

[47] Neither the terms of Advanced Cleaning's engagement, nor the terms of its contract with Chartaprops, can operate to discharge it from a legal duty to persons who are strangers to those contracts. Nor can they directly determine what it must do to satisfy its duty to such persons. That duty is cast upon it by law, not because it made a contract, but because it entered upon the work. Nevertheless, its contract with the building owner is not an irrelevant circumstance, for it determines the task entered upon.

[48] Chartaprops was obliged to take no more than reasonable steps to guard against foreseeable harm to the public. In this regard, it is well to recall the words of Scott JA in Pretoria City Council v De Jager [1997 (2) SA 46 (A) at 55I].

> 'Whether in any particular case the steps actually taken are to be regarded as reasonable or not depends upon a consideration of all the facts and circumstances of the case. It follows that merely because the harm which was foreseeable did eventuate does not

> mean that the steps taken were necessarily unreasonable. Ultimately the enquiry involves a value judgment.'
>
> *Applying that test I am satisfied that the High Court erred in holding Chartaprops liable. Its findings in relation to Advanced Cleaning, however, cannot be faulted."*

[39] In my view the decision in *Chartaprops* is on all fours with the present matter. I should add that it makes no difference that in this case the owner is not responsible for the day-to-day management of the centre. It has lawfully contracted with Cenprop to attend to that function.

[40] For some reason which was not explained, the plaintiff elected not to cite JKL as a co-defendant. After all JKL was the party directly responsible for cleaning the floors at the Mall. It was the party which had installed the "Wet Floor" sign that day well knowing that it was raining and that water was likely to be transported in and, in those circumstances, it bore the ultimate responsibility ("*the duty"*) to ensure that it was safe for the plaintiff to venture into the Mall with her children.

CONCLUSION

[41] In the circumstances I am satisfied that Cenprop, having been given the duty to do so by Naheel, properly discharged its management functions at the Mall that Saturday morning and that it has not been shown that either defendant was

negligent in relation to the injuries sustained by the plaintiff. It follows that the plaintiff's claim against them must fail.

Accordingly it is ordered that the plaintiff's claim be dismissed with costs, such costs to include the qualifying expenses of Mr. Anthony Hockly.

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GAMBLE, J