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

REPORTABLE

CASE NO: 8377/2019

In the matter between:

MARIA WILLIAMS	Plaintiff
and	
PICK 'N PAY RETAILERS (PTY) LTD	Defendant
TRADESOON 1020 (PTY) LTD t/a BLUEDOT	Third Party

Bench: P.A.L. Gamble, J

Heard: 15, 16 May & 9 June 2023

Delivered: 1 September 2023

This judgment was handed down electronically by circulation to the parties' representatives via email and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on Friday 1 September 2023.

JUDGMENT

GAMBLE, J:

INTRODUCTION

1. During the late morning of Monday 13 November 2017, the plaintiff, Ms. Maria da Luz Williams, went shopping at her local supermarket, Pick ‘n Pay, at the N1 City Mall in Goodwood. She was a regular customer at that store and was well known to the staff, inter alia, because her late husband, who sometimes accompanied her to the store, was a famous rugby player.

2. The plaintiff was in the company of her sister and, having completed her shopping, went to the till to pay. While standing there the plaintiff suddenly remembered that she had forgotten an item – an electric fly repellant, as she testified. She set off down aisle no 4 to collect the item and returned back to the till up a different aisle – no 5 apparently. While walking back to the till along aisle 5 the plaintiff slipped. Her feet shot out ahead of her and she landed on her left side. The plaintiff was in some quite considerable discomfort and unable to get back on her feet immediately.

3. Pick ‘n Pay employed a customer services manager by name of Ms. Deliwe Sitsholwane, who was on duty on the day in question. As I understand the position of the customer services manager as described by the parties, she was not the overall manager of the store or even a person responsible for the ordering and/or presenting of goods and produce, but rather a person with whom the public might engage if they had queries about products on offer or perhaps the return of unwanted goods. Ms. Sitsholwane was thus expected to attend to the needs and queries of customers in the supermarket.

4. The plaintiff explained that the customer services manager usually wore a red uniform and was affectionately known by shoppers as “The Lady in Red.” The

plaintiff testified that while she was still on the floor, Ms. Sitsholwane was the first person to come to her assistance. She was eventually helped into a wheelchair and later taken to the nearby N1 City Hospital for medical attention. The plaintiff said she suffered certain orthopaedic injuries for which she has received treatment and in respect whereof she will require further treatment.

5. The plaintiff testified that Ms. Sitsholwane and some of the other employees were most concerned that the incident would attract adverse media publicity given her quasi-celebrity status. They asked the plaintiff not to go to the media and assured her that Pick ‘n Pay would compensate her for her medical expenses. However, Pick ‘n Pay did not make good on those promises of compensation and the plaintiff was required to issue summons in May 2019 in which she claimed general damages for pain and suffering as well as medical expenses, both past and future.

THE PLEADINGS

6. In its plea, Pick ‘n Pay, while admitting that it had a general duty of care to customers visiting its store to ensure that it afforded them a safe environment within in which to shop, denied any liability on its part. It expressly pleaded that the plaintiff’s fall was due to her sole negligence in that she failed to keep a proper lookout, failed to take reasonable steps to prevent her fall and failed to avoid injury to herself. In the alternative Pick ‘n Pay pleaded contributory negligence on the part of the plaintiff and asked the court to reduce any proven damages by an equitable amount, due regard being had to the degree of the plaintiff’s alleged negligence.

7. Pick ‘n Pay further pleaded that it had outsourced the cleaning duties and functions at that store to a company known as Tradesoon 1020 (Pty) Ltd which trades as “Bluedot” who, it had been agreed, would be liable to anyone injured as a

consequence of its failure to properly discharge its cleaning function. Pick ‘n Pay went on to allege that –

“7.5. In the circumstances, the Defendant had taken all reasonable care and steps to comply with its obligations *vis-a-vis* the Plaintiff, in that the Defendant provided a regular cleaning service, that in the circumstances, took all reasonable steps to prevent any harm befalling the Plaintiff.”

Pick ‘n Pay then issued a third party notice to Bluedot asking for a declaratory order that it be held liable to indemnify Pick ‘n Pay for any damages that might be awarded against it in favour of the plaintiff.

8. In its plea to the third party notice, Bluedot pleaded that the plaintiff’s alleged injuries were not attributable to any negligence on the part of its employees, contending that such injuries were attributable to the plaintiff’s own negligence. Bluedot went on to allege in the alternative that the plaintiff’s injuries were attributable to the negligence of a merchandiser who had failed to ensure that the area in which he or she was operating and packing merchandise was kept safe and did not cause any danger or hazard to persons in the store and that he or she had caused spillage in the store and had failed to take reasonable measures to ensure the safety of persons in the store and in particular the plaintiff.

9. When the trial commenced before this Court, the plaintiff was represented by Adv. P. Eia, Pick ‘n Pay by Adv. S. O’Brien and Bluedot by Adv. R.C. Jansen van Vuuren. The parties were in agreement that the Court was required to determine only the issue of liability, with the quantum to stand over. The Court then heard the evidence of just three witnesses – the plaintiff, Ms. Sitsholwane and the Bluedot cleaner on duty at that time, Ms. Nozuko Naka.

THE RELEVANT EVIDENCE

10. The plaintiff described the calamity as set out above and testified that, while she sat on the floor after her fall, she noticed that she had slipped on some spillage. She said that the sole of one of her sandals was covered in an oily substance which she thought was a reddish-orange colour. She was unable to describe just what the substance was, but it is common cause that the accident occurred close to a shelf where pasta and sauces were on display. Ms. Sitsholwane offered assistance and helped the plaintiff clean the substance off her sandal: Pick 'n Pay's employee thus had direct knowledge of the fact that the plaintiff had slipped on some spillage in the supermarket.

11. Eventually the plaintiff was put into a wheelchair and taken to the parking lot outside the supermarket where she was helped into her vehicle and driven to the N1 City Hospital close by and treated for her injuries. The plaintiff testified that the vehicle was driven by her sister but it later transpired that it was in fact Ms. Sitsholwane, who assisted by driving the plaintiff's vehicle to the hospital and then walked back the short distance to the shopping centre.

12. Under cross-examination by Mr. O'Brien, the plaintiff was referred to a contemporaneous note taken at an earlier inspection *in loco* conducted by the parties on 2 February 2022 where the plaintiff had explained and demonstrated to the parties' legal representatives just what had happened to her. There it transpired that she had said that while walking down aisle 5 "*at a fast pace…and when opposite the mayonnaise bottles on the shelves, her right foot slipped from underneath her in a right-backward direction. This caused her to stumble forward and fall*."

13. The plaintiff was also referred to a so-called "Incident Report" – a document which had been compiled by Pick 'n Pay shortly after the event. Some of

the document was completed by the plaintiff in her own handwriting and another part thereof by Ms. Sitsholwane. The document placed before Court omitted the second page of the original report and is thus incomplete. Be that as it may, the incident report (which appears to have been a contemporaneous note) recorded that the plaintiff had said that she was walking down aisle no 5 with a packet of macaroni in her hand and that she "*just slipped*". It further recorded that Ms. Sitsholwane had noted that the substance "*looked like jam spillage, had oil in it caused (sic) customer to slip*."

14. The discrepancies in these recordals are of no great consequence and do not detract from the plaintiff's veracity in the witness box: she was a good witness who answered questions put to her frankly and truthfully. There is accordingly no reason to reject the plaintiff's version.

15. Ms. Sitsholwane was called to testify about her interaction with the plaintiff after her fall and she went on to describe (in fairly general terms) the store layout and the cleaning regime which was supposed to have been in place at the time. She explained that the floors in the store were usually cleaned last thing at night after the store closed its doors to customers. The next morning the cleaning staff would be required to conduct a walkabout to ensure that the store was in order and safe for the entry of shoppers.

16. Ms. Sitsholwane went on to explain that Bluedot's staff were required to be on duty throughout the day and that they patrolled up and down the aisles, cleaning as they went along. If there was a specific complaint regarding a spillage, a member of the cleaning staff was supposed to be promptly summoned and a plastic sign put up at the area of spillage, warning customers of the presence of a hazard.

17. Ms. Sitsholwane confirmed that she had attended to the plaintiff after her fall, had cleaned the sole of her sandal and had noted an unidentifiable substance on the floor, which she described as oily rather than sticky. In her evidence, she attempted to minimize the extent of the spillage saying that it was no bigger than a R2 coin but it really matters not what the extent thereof was as its mere presence on the supermarket floor presented a risk to any unassuming shopper, who would be expected to spend her morning looking at the merchandise on the shelves and not peering down at the floor ahead of her.

18. Under cross-examination, Ms. Sitsholwane explained that the cleaning regime required the staff of Bluedot to move through the aisles in numerical sequence from aisle 1 to 6. She assumed that the spillage had been on the floor of aisle 5 for only a short while as she said that the cleaner had been seen in aisle 6 after the fall, which led Ms. Sitsholwane to conclude that she had finished her work in aisle 5 before the plaintiff's accident. This fact appears to have been recorded in the incident report.

19. Ms. Sitsholwane also confirmed her recordal in the incident report that an external merchandiser (who was not employed by Pick 'n Pay), a certain Severiano Jehoma, had been busy arranging his company's wares on a shelf close by and had witnessed the plaintiff's fall. He was, however, not called as a witness by any party.

20. Lastly the Court heard the evidence of Ms. Naka, who no longer works for Bluedot. She testified that she had finished cleaning aisle 5 that morning and was busy in aisle 6 when she was called across to aisle 5. There she found some spillage which she identified as resembling mayonnaise. It had already been covered over by the said merchandiser with a piece of cardboard so as to avoid it presenting a hazard to shoppers. Ms. Naka said she cleaned up the spillage and put up a cautionary sign

until the floor was dry. She went back after a while and retrieved the sign, noting that the floor was then dry.

21. Thereafter, said Ms. Naka, she continued with her duties until, about an hour later, she heard that a shopper had fallen in the aisle which she had allegedly cleaned earlier. She told the Court that she knew nothing of the incident involving the plaintiff, did not see her lying on the floor or being helped about in a wheelchair and only heard about the plaintiff's fall later when others in the store spoke thereof. That then the evidence. What of the law?

THE APPLICABLE LEGAL PRINCIPLES

22. The issue of liability on the part of shop-keepers and building owners in these so-called "slip 'n trip" cases has enjoyed a fair degree of consideration in our law in recent decades. Many thought that Chartaprops[1] was the last word on the topic until Cenprop[2] when the Supreme Court of Appeal (SCA) recently sought to revisit it.

23. In Cenprop the facts were that it was a rainy day and the plaintiff slipped on a puddle of water in a public area inside a shopping mall notwithstanding the presence of warning signs cautioning her of wet floors. It was common cause that rainwater had most likely been transported into the mall through the pedestrian traffic of other shoppers and had been there some while. Further, it was a situation where it was known that the tiles used in the mall area were slippery underfoot when wet. Ultimately, the SCA found that Cenprop, the building owner, was liable for the shopper's injuries.

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

[2] Cenprop Real Estate (Pty) Ltd and another v Holtzhauzen 2023 (3) SA 54 (SCA)

24. Cenprop differs materially from this matter on the facts, as the SCA noted at [28] –

"(T)his…is **not** a case of spillages that sprout unexpectedly at the mall." (Emphasis added)

In the present matter we are indeed dealing with a sudden and unexpected spillage and the case thus rather bears resemblance to the situation in Probst[3] (where the plaintiff stepped into a pool of cooking oil in a supermarket aisle) rather than the Cenprop scenario referred to above.

25. On the other hand, this case is on a similar legal footing to Chartaprops and Cenprop in that the outsourcing of the cleaning function and the cleaning company's concomitant duties and responsibilities were pleaded by the mall owner. It was suggested in those cases that the owner had done enough to discharge its duty of care to ensure the safety of customers by engaging the services of a third party contractor to do the cleaning.

26. In Chartaprops the plaintiff sued the mall owner and the cleaning company jointly and severally, while in Cenprop the plaintiff sued the owner of the building and its managing agent but not the cleaning company. In this matter, on the other hand, the plaintiff sued only the store owner alleging that it was the sole wrongdoer liable for her damages.

27. As already pointed out, the cleaning company has been joined as a third party and is thus before the Court. It has presented evidence purporting to explain the steps it took on the day in question in purported discharge of its contractual responsibilities to Pick 'n Pay under a service level agreement and the latter has

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[3] Probst v Pick 'n Pay Retailers [1998] 2 All SA 186 (W)

asked the Court to declare that Bluedot is liable to it for any damages that may eventually be proven against Pick ‘n Pay.

28. In Cenprop the SCA proceeded to restate the approach in matters of this kind with reference to the well-known and oft-quoted decision in Kruger[4].

“For the purposes of liability culpa arises if –

‘(a) a diligens paterfamilias in the position of the defendant –

(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

(ii) would take reasonable steps to guard against such occurrence; and

(b) the defendant failed to take such steps.

This has been constantly stated by this Court for some 50 years. Requirement (a)(ii) is sometimes overlooked. Whether a *diligens paterfamilias* in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case. No hard and fast basis can be laid down. Hence the futility, in general, of seeking guidance from the facts and results of other cases.”

29. With reference to a building owner’s responsibility towards the welfare of shoppers utilizing its premises, the SCA in Cenprop[5] referred with approval to the judgment in Probst. In relation to the sufficiency of evidence which needs to be

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[4] Kruger v Coetzee 1966 (2) SA 428 (A) at 430E-G

[5] At [22]

adduced to establish negligence on the part of the shopkeeper in such cases, the learned judge said the following in Probst [6].

"(I)n such a case the plaintiff generally cannot know either how long the slippery spillage had been on the floor before it caused his fall, or how long was reasonably necessary, in all of the relevant circumstances (which must usually be known to the defendant), to discover the spillage and clear it up. When the plaintiff has testified to the circumstances in which he fell, and the apparent cause of the fall, and has shown that he was taking proper care for his own safety, he has ordinarily done as much as it is possible to do to prove that the cause of the fall was negligence on the part of the defendant who, as a matter of law, has the duty to take reasonable steps to keep his premises reasonably safe at all times when members of the public may be using them… It is therefore justifiable in such a situation to invoke the method of reasoning known as *res ipsa loquitur* and, in the absence of an explanation from the defendant, to infer *prima facie* that a negligent failure on the part of the defendant to perform his duty must have been the cause of the fall. As explained in Arthur v Bezuidenhout and Mieny [1962 (2) SA 566 (A)] this does not involve any shifting of the burden of proof onto the defendant: however, it does involve identifying the stage of the trial at which the plaintiff has done enough to establish, with the assistance of reasoning on the lines of *res ipsa loquitur,* a *prima facie* case of negligence on the part of the defendant, so that unless the defendant meets the plaintiff's case with evidence which can serve, at least, to invalidate the *prima facie* inference of negligence on his (the defendant's) part, and so to neutralize the plaintiff's case, judgment must be entered for the plaintiff against the defendant. In this situation the defendant does not have to go so far as to establish on the balance of probabilities that the accident occurred without negligence on his part: it is enough that the defendant should produce evidence which leads to the inference that the accident which caused harm to the plaintiff was just as consistent with the absence of any negligent act or omission on the part of the defendant as with negligence on his part. The plaintiff will then have failed to discharge his onus, and absolution from the instance will have to be ordered."

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[6] At 197g – 198c

30. In Cenprop the SCA looked at the inter-relationship between the building owner and the cleaning company in the context of what it called "*The Chartaprops defence*". It found that the building owner in that matter had used a type of tile in the passages of its mall which were prone to be slippery when wet and that, knowing this to be the case, it should have been reasonably foreseeable to the owner that harm might be occasioned to a shopper in rainy conditions such as those that prevailed on the day in question.

31. The SCA went on to conclude that the case was thus distinguishable from Chartaprops and that the owner could not, in the circumstances, rely on the fact that it had appointed an independent contractor to attend to its cleaning functions to avoid liability to the injured shopper.

[31]…Unlike the situation of ad hoc spillages, rainy weather posed a special and foreseeable situation which ought to have been mitigated. In this situation the role played by the security company would not really assist, as the security guards would simply notify the cleaners when they noticed a spillage. There was already a wet signage at the door, which signaled knowledge of the wet conditions.

[32]… The rainy conditions on that day made it reasonably foreseeable that possible danger and harm would occur, thus the appellants as the diligens paterfamilias in this regard should have foreseen the possible danger that would be caused by trafficking in of rainwater brought in by the shoppers and should have then taken active reasonable steps to guard against this possible danger…

[34] Thirdly, the issue of the make of the tiles, which directly implicates the principal, could not be put at the foot of the cleaning company. While experts differ as to the textural suitability of the tiles, their evidence converge on the fact that when wet the tiles were potentially dangerous. The circumstances of this case seem to put it in the category of cases where the

owner and manager would be personally at fault. That is why the Chartaprops defence cannot come to the appellants' aid."

In the present matter the potential source of danger to the shopper is more akin to the situation that existed in Chartaprops and the case is thus to be distinguished from Cenprop.

THE *CHARTAPROPS* DEFENCE RESTATED

32. In Cenprop the SCA summarised the defence as follows.

"[24] In *Chartaprops*, this Court dealt with questions (sic) of whether a principal may be held liable for the negligence of an independent contractor. The respondent in that case sued the shopping mall owner, *Chartaprops*, and a cleaning company, Advanced Cleaning. The majority judgment remarked about varying legal positions that were adopted by courts on this issue. It set out principles to be followed when dealing with the liability of a principal and an independent contractor. It observed that 'the correct approach to the liability of a principal for the negligence of an independent contractor is to apply the fundamental rule of our law that obliges a person to exercise that degree of care that the circumstances demand.' In this regard, it referred to *Cape Town Municipality v Paine*, [1923 AD 207 at 217] where it was held: '*The question whether, in any given situation, a reasonable man would have foreseen the likelihood of harm and governed his conduct accordingly, is one to be decided in each case upon a consideration of all the circumstances. Once it is clear that the danger would have been foreseen and guarded against by the diligens paterfamilias, the duty to take care is established, and it only remains to ascertain whether it has been discharged*. .'

[25] The Court distinguished between the category of cases where work is committed to a contractor and if properly done no injurious consequences could arise and those cases where work is to be done from which mischievous consequences would arise, unless preventative measures were taken. In the latter category it said [at para's 39 & 40], *'if liability is to attach to the principal it would be in consequence of his/her negligence in failing to take preventative*

measures to prevent the risk of harm from materialising that a reasonable person in those circumstances would have taken, other than in accordance with a proposition framed in terms of non-delegable duty.'

[26] It endorsed the general rule in *Langley Fox Building Partnership (Pty) v Da Valence* [1991 (1) SA 1 (A) at 13B] that a principal is not liable for the civil wrongs of an independent contractor except where the principal was personally at fault and restated the classic test for culpa as set out in *Kruger*. In determining the answer to the second enquiry into negligence set out in *Kruger,* it noted the following factors emphasised in *Langley*, namely, 'the nature of the danger; the context in which the danger may arise; the degree of expertise available to the employer and their independent contractor respectively; and the means available to the employer to avert the danger'.

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

'This plainly is not the type of case where it can be said that *Chartaprops* negligently selected an independent contractor or that it so interfered with the work that damage results or that it authorised or ratified the wrongful act. The matter thus falls to be decided on the basis that the damage complained of was caused solely by the wrongful act or omission of the independent contractor, Advanced Cleaning, or its employees. *Chartaprops* did not merely content itself with contracting Advanced Cleaning to perform the cleaning services in the shopping mall. It did more. Its centre manager consulted with the cleaning supervisor each morning and personally inspected the floors of the shopping mall on a regular basis to ensure that it had been properly cleaned. If any spillage or litter was observed, he ensured its immediate removal. That being so it seems to me that *Chartaprops* did all that a reasonable person could do towards seeing that the floors of the shopping mall were safe. Where, as here, the duty is to take care that the premises are safe I cannot see how it can be discharged better than by the employment of a competent contractor. That was done by *Chartaprops* in this case, who had no means of knowing that the work of Advanced Cleaning was defective. *Chartaprops*, as a matter of fact, had taken the care which was incumbent on it to make the premises reasonably safe. . . .

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

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

HAS PICK 'N PAY ESTABLISHED THE *CHARTAPROPS* DEFENCE?

33. Given the alternative allegations made in its plea, it is apparent that Pick 'n Pay seeks to rely on the *ratio* of the majority judgment of the SCA in Chartaprops. The question that then arises for decision is whether, having taken what it alleges are reasonable steps to engage the services of an independent cleaning contractor in the form of Bluedot, Pick 'n Pay can now avoid liability for the plaintiff's alleged injuries?

34. The first issue raised in the plea, however, is that the plaintiff's alleged injuries were occasioned by her own negligence. In this regard it is important to note that it was never suggested to the plaintiff under cross-examination that she was the author of her own misfortune. That was because it is common cause that there was an unidentified slippery substance (or spillage) on the floor and that this occasioned her fall.

35. Having regard to the approach set out above in Probst, I am satisfied that the plaintiff has established that she took proper care for her own safety on the morning in question. The fact that she may have moved down aisle 5 at more than a leisurely dawdle did not occasion her fall: she did not slip or trip because of haste or inattention but because she stepped in some spillage of unknown origin. In the

circumstances, I am unable to find that the plaintiff was negligent in relation to her fall and the consequent injuries she sustained.

36. That being so, there is then a shift in the evidential burden to Pick ‘n Pay on the strength of Probst to rebut the inference arising from the application of the maxim *res ipsa loquitur.* As is suggested in that case, the question of how long the spillage had been *in situ* is a material consideration in this case in determining whether Pick ‘n Pay has rebutted the prima facie inference of negligence.

37. Other than the generalised evidence of Ms. Sitsholwane regarding the standard procedure that the Bluedot cleaners were expected to adhere to in that particular supermarket, there is a dearth of direct evidence as to what regime had actually been followed on the day in question. In her evidence Ms. Sitsholwane referred to the presence of a “supervisor” called Ronald at the supermarket who, it seems, was responsible for monitoring the performance by the cleaning staff of their duties. I assume from the context of the evidence that the said Ronald was an employee of Pick ‘n Pay and not Bluedot. Be that as it may, there was no evidence from such a supervisor referencing, for example, work sheets from the cleaners as to which aisles had been cleaned and by whom, or when.

38. The facts recorded in the incident report by the plaintiff note that she fell at “*plus/minus 11:30”*, while in the section of the same form filled in by Ms. Sitsholwane it was said that “*the area was last inspected/cleaned prior to the incident…[at] 11:20am”.* Further, in response to the question “*How frequently is the area inspected during operating hours?*” Ms. Sitsholwane noted that “*Cleaners are visible whole day”.*

39. In her evidence before the Court, Ms. Sitsholwane was unable to give an accurate estimate as to how long the spillage had been in place as the following passage demonstrates.

"MR O'BRIEN: Do you know how long that spillage was on that floor before you came there?

MS SITSHOLWANE: It's a difficult one to say how long, because I know that on my report I did say a few minutes. The reason so that I said……The reason is that it was a few minutes before, because we had cleaners that were cleaning on the next aisle. That was aisle number 6 and I assumed that it would then be a few minutes before the customer fell. Because there cleaners that were busy cleaning the next aisle.

COURT: Would their natural route in the store be from aisle 1, 2, 3, 4, 5, 6?

MS SITSHOLWANE: That is correct Your Honour.

COURT: So in aisle 6 would it be logical to conclude that they had already finished in aisle 5.

MS SITSHOLWANE: That is correct Your Honour.

COURT: It wasn't as if they were working backwards from aisle 6 to aisle 1.

MS SITSHOLWANE: No Your Honour, that is there (sic) daily routine. When they are doing spot checks, they would go aisle by aisle."

40. In the incident form, provision is also made for the recordal of how long the spillage had been in place before the plaintiff trod in it. In this regard Ms. Sitsholwane noted -

"*Few minutes before the customer walked through the isle (sic)".*

There is then a follow up question which asks -

"*How did you determine the above as the investigator?"*

The answer here was -

"*I viewed the footage."*

41. This last remark elicited some questioning by Mr. Eia under cross-examination. It then transpired that there was CCTV footage available to Pick 'n Pay recording the movement of customers and staff on that day. The suggestion in the incident report form by Ms. Sitsholwane that the CCTV footage might shed some light as to how long the spillage had been on the floor proved to be no more than idle speculation on her part. It was common cause, in this regard, that the plaintiff's fall was not captured on the footage due to a technical feature of the recording and it was further common cause that the spillage was not visible either. The answer on the incident form is thus wrong.

42. Furthermore, and as I have said above, in the section of the incident report which she filled in, Ms. Sitsholwane referred to the presence of the merchandiser, Mr. Jehoma, at the very place where the plaintiff fell. And, in her evidence, Ms. Sitsholwane effectively confirmed the allegation made by Bluedot in its plea to the third party notice that Mr. Jehoma was present when the plaintiff fell and that he would have been in a position to confirm how long the spillage had been on the floor.

43. The evidence established that Mr. Jehomah was employed by a company called Smollan which was responsible for the marketing within the supermarket of various brands of merchandise. It stands to reason that Pick 'n Pay

would thus have had access to Mr. Jehomah's contact details via Smollan and would have been expected to call him if his evidence sustained the fact that the spillage had only been there shortly before the plaintiff fell, thus meeting the test in Probst.

44. In the result, I conclude that Pick 'n Pay's failure to adduce such evidence leads to the reasonable inference that the spillage had been on the floor for some time before the plaintiff fell and that it had failed to ensure that the spillage was timeously removed by Bluedot.

45. The speculation inherent in Ms. Sitsholwane's evidence – that the spillage had only been deposited on the floor shortly before the plaintiff fell - is not supported by the testimony of Ms. Naka whose evidence, regrettably, adds little to the piece. In fact, one might ask whether she was even referring to the same incident. Be that as it may, Ms. Naka stated that she had gone back to aisle 5 from aisle 6 to clean up the spillage of a small quantity of mayonnaise (manifestly not a reddish/orange coloured substance) at the request of the merchandiser busy in aisle 5 (presumably a reference to Mr. Jehomah) who had already put a piece of cardboard over the spot.

46. But that must have been some time before the plaintiff's fall, because Ms. Naka testified that she had time to go back and check up that the floor where she had cleaned up the mayonnaise was dry. She said further that it was only much later - perhaps as long as an hour - that she heard of the plaintiff's accident from other employees in the store.

47. In summary then, I am not persuaded that Pick 'n Pay has adduced any evidence of reliable and probative value to show that it is probable that the spillage which caused the plaintiff to fall had only been on the floor for a short while before she fell, that it had therefore taken all reasonable steps to ensure that the floor was free of

any danger and that it was safe for the plaintiff to proceed down aisle 5 on her way to the till.

48. It is no answer, in the circumstances, for Pick ‘n Pay to say that it had appointed an independent contractor to clean its floors and that it had thus taken all reasonable steps to ensure the safety of its customers. The facts show that Bluedot did not clean up the spillage which caused the plaintiff’s fall for an appreciable period of time and had Pick ‘n Pay complied with its legal duty of care towards its customers, its staff would have detected the spillage, alerted the cleaners to the potential hazard and seen to it that they cleaned up the mess before the plaintiff trod in it.

CONCLUSION

49. In my considered view, then, Pick ‘n Pay has not adduced sufficient evidence to rebut the prima facie case of negligence put up by the plaintiff. In the circumstances, the plaintiff’s fall was occasioned by the negligence of Pick ‘n Pay’s employees and she is thus entitled to be fully compensated by Pick ‘n Pay for such damages as she may prove in the future.

50. Pursuant to, inter alia, clause 12 of its “Cleaning Service Agreement” with Pick ‘n Pay, Bluedot is liable to indemnify the supermarket group for any loss incurred by it as a consequence of an award for damages arising from the negligence of Bluedot’s employees in the execution of their functions and duties under that agreement. I did not understand Mr. Jansen van Vuuren to contend that the indemnity should not apply in the event that it was held that Pick ‘n Pay is liable to the plaintiff for damages arising from her fall on that day.

51. In the circumstances, Pick ‘n Pay is entitled to a declaratory order confirming that Bluedot is obliged to indemnify it in accordance with their agreement.

ORDER OF COURT

A. It is ordered that the defendant is liable to pay to the plaintiff 100% of such damages as she may establish in due course arising out of her fall at the N1 City branch of the defendant on 13 November 2017.

B. The defendant shall pay the plaintiff's costs of suit herein.

C. The third party is liable to indemnify the defendant fully in accordance with the relevant provisions of its "Cleaning Service Agreement" with the defendant dated 27 May and 5 August 2015.

D. The third party shall bear its own costs of suit.

GAMBLE, J

APPEARANCES

For the Plaintiff: Mr. P Eia
Instructed by A Batchelor & Associates.
Cape Town.

For the Defendant: Mr S O'Brien
Instructed by Adams Attorneys
Cape Town.

For the Third Party: Mr RC Jansen van Vuuren
Instructed by Van Breda & Herbst Inc.
Pretoria.