IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: A 220/2016

A 146/2016

A quo case no. 32665/2010

Heard on: 4 September 2019

Date of judgment: 25 October 2019

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

25/10/19 .....
DATE SIGNATURE

In the matter between:

GERHARD POTGIETER MAINTENANCE CLEANING SERVICES (WITBANK) CC T/A MR CLEAN — **Appellant (A146/2016) (Second Defendant *a quo*)**

SHOPRITE CHECKERS (PTY) LTD — **Appellant (A 220/2016) (First Defendant *a quo*)**

and

SUSANNA JACOBA GORDON — Respondent (A 146/2016) (Plaintiff *a quo*)

GERHARD POTGIETER MAINTENANCE CLEANING (WITBANK) CC t/a MR CLEAN — Respondent (A 220/2016) (Second Defendant *a quo*)

JUDGMENT

SWANEPOEL AJ (Fourie J and Munzhelele AJ concurring):

BACKGROUND

[1] In the early afternoon of 6 February 2009 respondent (referred to as "Gordon" hereafter") entered the shop of Shoprite Checkers at Menlyn Centre. This appellant, in case number A 220/2016, is referred to herein as "Shoprite".

[2] Gordon intended to purchase a cold drink, and as she approached the cold drink refrigerators she slipped and fell, injuring her back. As she stood up she noticed that her slacks were wet and that there was fluid (most likely water) on the ground. Gordon found a cleaner standing just around the corner from the refrigerators. He was wearing a maroon uniform with the words "Mr. Clean" displayed on his chest, and he was having a conversation with other persons. The cleaner took Gordon to his supervisor who provided her with the contact details of a person at Shoprite's head office who could assist her with a claim for damages.

[3] Gordon entered into correspondence with Shoprite with a view to receiving compensation for her injury, and ultimately Gordon's claim was referred to Glenrand M.I.B., Shoprite's insurance brokers. On 16 February 2009 Wendy Rieken, an employee of Glenrand M.I.B., wrote an email to Gordon wherein she recorded that Glenrand represented Shoprite in the matter. She also asked for a detailed statement relating to the incident so that she could consider the claim. Gordon duly provided a statement, (by email) and on 25 March 2009 Rieken sent Gordon an email in which she stated that Shoprite denied liability for Gordon's damages.

[4] Of importance is that Rieken also wrote the following:

> *"This being said however, we have re-directed the claim to Mr. Clean who are the contractors (with their own, independently-managed staff) who are in charge of the shop's cleanliness.*
>
> *They are aware of your claim and will in turn notify their insurers so that the matter can receive attention."*

[5] On 8 September 2009 Gordon's counsel addressed a letter to her attorney in which he suggested that the identity of the cleaning service should be ascertained so that it could be joined as a party to the proceedings. On 23 September 2009 Gordon's attorney wrote to counsel advising him that Gerhard Potgieter Maintenance Services (Witbank) CC, which traded as "Mr. Clean" ("Mr. Clean" hereinafter) was the cleaning service which had been contracted to Shoprite.

[6] On 4 June 2010 Gordon issued summons against Shoprite claiming damages in the sum of R 338 890.18. Shoprite defended the matter, and on 4 April 2011 it delivered its plea. In paragraph 9.2 thereof Shoprite specifically pleaded that Mr. Clean was the cleaning service had been contracted to provide cleaning services in the shop. Simultaneously with the plea, Shoprite delivered a notice in terms of rule 13 of the Uniform Rules of Court to Mr. Clean, claiming that Shoprite was entitled to be indemnified by Mr. Clean should it be found to be liable for Gordon's damages.

[7] There was then a lull in the matter until 27 June 2013, when Gordon launched an application to join Mr. Clean as second defendant in the main matter. An order joining Mr. Clean as second defendant was granted on 17 March 2013, and the amendment of Gordon's particulars of claim setting out her claim against Mr. Clean was effected on 29 April 2014.

THE DISPUTES

[8] In pleading to Gordon's particulars of claim, Mr. Clean averred that the incident had occurred on 6 February 2009, on which date Gordon knew, alternatively should reasonably have known, that it was Mr. Clean's staff that had cleaned the shop and that her claim therefore lay against Mr. Clean. Mr. Clean pleaded that Gordon's notice to amend her particulars of claim had only been filed on 28 March 2014, which was more than three years after the incident, and that the claim had consequently prescribed.

[9] In its plea to the third party notice, Mr. Clean admitted that it had entered into a service level agreement with Shoprite. However, it raised two defences.

The first, which was not pursued, was that the dispute should have been referred to arbitration. The second dispute, which remains alive, is that Mr. Clean denied that it had been negligent, or that its negligence had caused Gordon to fall and, so it says, it acted as a reasonable specialist service provider would have done by providing a full-time employee to that particular part of the shop. For those reasons Mr. Clean denies that it is liable to indemnify Shoprite against Gordon's claim.

[10] The court *a quo* heard the evidence of Gordon and Rieken. Having heard their evidence the court found that:

10.1 Both defendants had been negligent by not ensuring that a proper plan was in place to maintain the cleanliness of the floor. Both defendants were held liable for Gordon's damages;

10.2 In respect of Shoprite's third party claim against Mr. Clean, the court *a quo* found that the service level agreement had not been proven.

10.3 In respect of the plea of prescription, the court found that Gordon's claim had not prescribed.

[11] Shoprite was granted leave to appeal by the Supreme Court of Appeal, both in respect of the finding that it was liable to Gordon for damages, and in respect of its claim for an indemnification by Mr. Clean. Shoprite has abandoned its appeal against Gordon, and all that remains in respect of Shoprite, is its claim for an indemnification by Mr. Clean. Mr. Clean was granted

leave to appeal against the judgment of the court *a quo* only on the question whether Gordon's claim against it had become prescribed.

[12] Those are therefore the two appeals before us. I will deal first with the Shoprite appeal against Mr. Clean, and then with the Mr. Clean appeal against Gordon.

SHOPRITE APPEAL AGAINST MR CLEAN: CASE NO. A 220/2016

[13] It was common cause on the pleadings that Shoprite and Mr. Clean had entered into a service level agreement in terms of which Mr. Clean agreed to provide cleaning services to Shoprite. The court *a quo* found, in my view erroneously, that the service level agreement had not been proven. The fact is, that as between Shoprite and Mr. Clean, the service level agreement was common cause. The terms of the agreement are not in dispute and are contained in the unsigned document which formed part of Shoprite's third party notice.

[14] The relevant clause in the agreement reads as follows:

> ***"11. INDEMNITY***
>
> *11.1 The service provider hereby irrevocably indemnifies Shoprite, its directors and employees and holds them harmless against any claim which may be made against any and all of them, the cause of action of which arose out of or in connection with any act or omission on the*

part of the Service Provider or its personnel or any breach by the service provider or its personnel of any of the terms and conditions contained herein, including breach of warranty."

[15] There was some debate between the parties about the interpretation of the agreement. In the matter of ***Natal Joint Municipal Pension Fund v Endumeni Municipality*** **2012 (4) SA 593 (SCA); ([2012] 2 ALL SA 262 (SCA))** the Court provided the following guidance on the interpretation of contracts:

"Interpretation is the process of attributing meaning to the words used in a document, be it legislation, or some other statutory instrument or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all of these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document..... The 'inevitable point of departure is the language

of the provision itself read in context and having regard to the purpose of the provision and the background to the production of the document."

[16] In my view, there is nothing controversial in clause 11.1. On a normal reading thereof Mr. Clean was liable to indemnify Shoprite in the event of either one the following events occurring:

16.1 If Mr. Clean committed an act or omission which caused harm to another, for which Shoprite was held liable;

16.2 If Mr. Clean or its personnel breached any term of the service level agreement, and the breach resulted in harm to another for which Shoprite was held liable.

[17] The court *a quo* found that both Mr. Clean and Shoprite neglected to keep the floor clean, resulting in Gordon's fall, and consequently they were found to be jointly liable for Gordon's damages. Mr. Stoop SC, Mr. Clean's counsel, argued that the court a quo had made no finding whatsoever in respect of Shoprite's claim for an indemnification, and that the matter should be referred back to that court so that it could make a proper finding on whether either of the aforesaid grounds for liability had been established.

[18] It is so that the court *a quo* did not make a formal finding in respect of Shoprite's claim for an indemnification. The court did however find on a factual basis that Gordon's fall was as a result of negligence by both Shoprite and Mr. Clean. That finding would establish Mr. Clean's liability on the first of the

abovementioned two bases. No appeal lies against that finding, which is in my view, the end of the matter.

[19] However, even if I am wrong in that view, I respectfully concur with the finding made by the court *a quo* in respect of negligence. The following facts are relevant:

19.1 It is common cause that some substance that had leaked onto the floor in front of the refrigerators (most probably water), caused Gordon to fall.

19.2 Gordon testified that the refrigerators were faulty and had caused water to leak onto the floor. Although her version was disputed in cross-examination, no rebutting evidence was led.

19.3 Mr. Clean provided a cleaner to specifically clean that part of the shop, and when Gordon fell he was just around the corner from the refrigerators, engaged in a conversation with other persons.

19.4 Mr. Stoop conceded that Gordon's slacks were very wet after the fall, and that one could thus conclude that there had been quite a substantial amount of water on the floor.

19.5 There were no warning signs to alert customers of the potential danger posed by the water.

[20] The authorities applicable to a claim in these circumstances were analyzed at length in ***Probst v Pick and Pay Retailers (Pty) Ltd [1998] 2 ALL SA 186***

(W). Having discussed a number of English and South authorities, Stegman J held as follows:

"There is a sound reason of legal policy why the majority view should be followed: it is that in 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 the members of the public may be using them (cf. Alberts v Engelbrecht (supra)). 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."

[21] The *Probst*- approach was approved of in a number of other cases: ***Brauns v Shoprite 2004 (6) SA 211 (ECD); Chartaprops 16 (Pty) and another v Silberman 2009 (1) SA 265 (SCA); Checkers Supermarket v Lindsay 2009 (4) SA 459 (SCA)***. In ***Chartaprops*** (supra at 275 C) the Court agreed with Stegman J that the shopkeeper or its agent should put an adequate system in

place to discover and clean up any spillage that might occur. Implicit in that principle is that if there is a system in place, it must be adhered to.

[22] In my view, if the aforesaid facts are considered in the context of the applicable principles, they establish Mr. Clean's negligence. Both Mr. Clean and Shoprite were aware of the possibility of spillage from the refrigerators. Mr. Clean knew that its employees should ensure that the spillage was cleaned so that it did not pose a risk of harm to customers. Both Shoprite and Mr. Clean failed to ensure that the floor was free from moisture, and consequently both were quite correctly held liable to Gordon for her damages.

[23] In view of the above, Mr. Clean is liable to indemnify Shoprite for the harm caused by its omission to keep the floors dry.

MR CLEAN'S APPEAL AGAINST PLAINTIFF IN RESPECT OF THE PLEA OF PRESCRIPTION: CASE NO: A146/2016

[24] Section 12 (1) and (3) of the Prescription Act, Act 68 of 1969 reads as follows:

> *"12 When prescription begins to run*
>
> *(1) Subject to the provisions of subsections (2), (3), and (4), prescription shall commence to run as soon as the debt is due.*
>
> *(2) .....*
>
> *(3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from*

which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care."

[25] In ***Gericke v Sack 1978 (1) SA 821 (A.D.)*** the appellant claimed for damages resulting from a motor boat accident. The only question was whether the claim had become prescribed due to the lapse of time. Appellant had obviously known on the date of the accident of the facts underpinning her cause of action, but, she contended, she did not know the identity of the driver of the boat until some time later.

[26] In ***Gericke*** it was held that the *onus* to prove the special plea, in other words, when prescription commenced, and when it was completed, was always on the party who raises the defence of prescription. The Court found that appellant had sustained relatively minor injuries on the day of the incident, that she was thus capable of making enquiries as to the identity of the driver of the boat as the reasonable person in her position would have done, and that her claim had consequently prescribed.

[27] In this matter one can postulate a number of possible dates upon which prescription commenced:

27.1 On the date of the incident, 6 February 2009. As in ***Gericke*** Gordon sustained a relatively minor injury. She walked from the scene on her own steam, and was able to fully converse with the staff present on the scene;

27.2 On 25 March 2009 when Rieken sent an email to Gordon advising her of Shoprite's view that it was not liable for damages, and that the claim should be addressed to Mr. Clean;

27.3 On 23 September 2009 when Gordon's attorney ascertained that Mr. Clean had been the service provider;

27.3 On 4 April 2011 when Shoprite filed its plea in which it pleaded that the cleaning service had been provided by Mr. Clean and it claimed an indemnification.

DID GORDON ACT REASONABLY?

[28] There is much to be said for the argument that Gordon should reasonably have known on the day of the incident that the cleaners were not employed by Shoprite, and that she should then have made enquiries to ascertain the identity of the cleaning service. The cleaners were dressed in maroon uniforms which were different to that of Shoprite employees, and the words "Mr. Clean" were displayed prominently on their uniforms. The court *a quo* held that once Gordon formed the view that the cleaner was a Shoprite employee, that was the end of the matter. I respectfully disagree. The test is not a subjective one. The facts have to be considered objectively. The question to be determined is whether Gordon took reasonable steps to determine the identity of the debtor. In other words, was she entitled simply to accept that Shoprite was the cleaner's employer, or should she have taken steps to ascertain whether her belief was correct?

[29] In my view Gordon should have foreseen that the cleaner might not have been employed by Shoprite, and she should have taken steps to determine the identity of his employer. Such an approach would accord with the approach of the Appellate Division in ***Gericke***.

CORRESPONDENCE BETWEEN ATTORNEY AND COUNSEL FOR GORDON

[30] Much was made of the communications between Gordon's attorney and counsel in September 2009. Gordon had not discovered the respective emails, but her legal team had inadvertently included them in a bundle of documents that had been prepared for trial.

[31] Gordon's counsel submitted that the documents were privileged, that their inclusion in the bundle had been an error, and that that privilege had not, in these circumstances, been waived. Mr. Stoop, on the other hand, argued that the documents were not in the nature of communications that are protected by privilege, but, says he, in any event the privilege was waived when the documents were handed to Mr Clean's legal team. In my view, communications between attorney and counsel pertaining to the manner in which the case is to be conducted are privileged. Furthermore, in order for there to be a proper waiver of privilege, the person waiving the privilege must at least know that he or she is doing so. Where documents are erroneously handed to the other side, as happened in this case, that cannot constitute proper waiver. However, given the views set out below, I do not have to make a finding on this issue.

RIEKEN-GORDON CORRESPONDENCE

[32] Mr. Stoop's contention, that Gordon was apprised by Rieken's email of 25 March 2009 that the cleaner was employed by a separate and independent cleaning service and that it was called "Mr Clean", is compelling. Gordon and Rieken had been communicating by email for some time when, on 25 March 2009, Rieken sent the email referred to above. Gordon and Rieken had each other's email addresses, and had corresponded with one another at those addresses on previous occasions.

[33] Rieken testified that she sent the email to the same address from which she had previously received communications from Gordon. Rieken's computer usually sends her a message should an email not reach the server for which it was intended, but she did not on this occasion receive a so-called "bounce back" message. When Rieken did not receive an answer to her email, she sent a follow up email a month later, to the same email address. That message was also not returned to her.

[34] What convinces one that Gordon received the 25 March email, despite her protests to the contrary, is that before 25 March 2009 Gordon was quite persistent in pursuing her claim against Shoprite, and she kept abreast of the progress of her claim by corresponding with Rieken. Once the 25 March email was sent, Gordon never again tried to make contact with Rieken. The most likely deduction is that she had received Rieken's email. She knew therefore, that Shoprite had denied liability, and that she should pursue her claim against Mr. Clean.

[35] Gordon's evidence was also that around 25 March 2009 she decided to consult an attorney to pursue the claim on her behalf. It is likely that she realized at that stage, having seen the Rieken email, that it was of no purpose to try and pursue the claim through Rieken, and that she would need an attorney to issue summons on her behalf.

[36] I therefore find that it is most likely that Gordon knew on 25 March 2009 that the debtor was Mr. Clean and not Shoprite. The application to join Mr. Clean was delivered more than three years thereafter, on 27 June 2013, and the order for joinder followed even later, on 17 March 2004. In my view the claim had already prescribed on 25 March 2012.

COSTS OF 30 AUGUST 2017

[37] The last issue remaining relates to the order reserving the costs of 30 August 2017 when the appeal was postponed. We were advised that for a number of reasons the appeal could not proceed on that date, and the costs were consequently reserved. There were differing submissions as to the reason for the postponement, but I cannot determine exactly who, if anyone, was at fault.

[38] In the circumstances it was proposed to counsel that no order should be made as to costs of 30 August, or that there should be an order that each party shall pay its own costs. Counsel for Shoprite and Mr. Clean expressed their agreement with the proposal, but counsel for Gordon persisted with the submission that appellants should pay Gordon's costs. I am left completely in the dark as to the reason for the postponement. Had I had the benefit of

affidavits telling me why the matter was postponed, I might have been in a better position to make a finding. However, given the circumstances, I cannot do so.

[39] I consequently make the following orders:

IN SHOPRITE v MR CLEAN: CASE NO. A220/2016

39.1 The finding of the court *a quo* that no service level agreement had been proven is set aside;

39.2 The third party/second defendant is ordered to indemnify first defendant against any liability for the payment of damages to the plaintiff for injuries sustained by her on 6 February 2009,

39.2 The third party/second defendant shall pay the first defendant's costs, which shall include the costs of the application for leave to appeal and the appeal.

39.3 In respect of the proceedings of 30 August 2017, each party shall pay its own costs.

IN MR CLEAN V GORDON: CASE NO. A146/2016

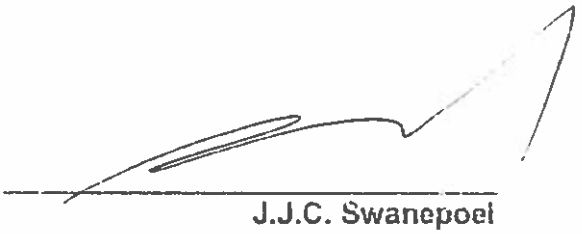
39.4 The finding of the court *a quo*, that the plaintiff's claim against second defendant had not become prescribed, is set aside and replaced with the following.

39.4.1 Plaintiff s claim is found to have prescribed on 25 March 2012;

39.4.2 Plaintiff s claim is dismissed;

39.4.2 Plaintiff shall pay the second defendant s costs, which shall include the costs of the application for leave to appeal, and the appeal.

39.5 In respect of the proceedings of 30 August 2017, each party shall pay its own costs.

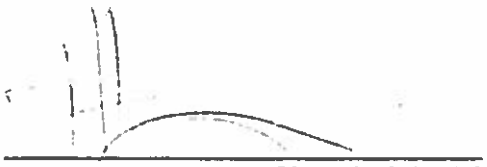


J.J.C. Swanepoel
Acting Judge of the High Court,
Gauteng Division, Pretoria

I agree,

D. S. Fourie J
Judge of the High Court
Gauteng Division, Pretoria

I agree,



Munzhelele AJ
Acting Judge of the High Court
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