IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: D12786/2018

In the matter between:

SIZAKELE ANGEL GASA **PLAINTIFF**

and

SHOPRITE CHECKERS (PTY) LTD **DEFENDANT**

ORDER

The following order is issued:

1. The plaintiff's claim is dismissed with costs.

JUDGMENT

HENRIQUES ADJP

Introduction

[1] This trial concerned what is colloquially referred to as a 'slip and fall' case which arose from an incident that occurred on 28 December 2015 at the Checkers Hyper, Pavilion Shopping Centre, Westville at around 13h00 in the vicinity of the till points. At all relevant times, the plaintiff was in the company of her husband and their four children, one of whom was four months old and whom she was carrying on her hip.

[2] At the commencement of the trial, the parties agreed to a separation in terms of Rule 33(4) of the Uniform Rules of Court in which the aspect of negligence was to be determined separately from that of quantum.

Issues

[3] The core issues that the court was required to determine were:

(a) what was the reason for the plaintiff's fall;

(b) whether the defendant's negligence contributed to the plaintiff's fall; and/or

(c) whether the plaintiff was contributory negligent, which negligence contributed to the fall.

Pleadings

[4] In paragraphs 7 and 8 of the particulars of claim the plaintiff sets out the grounds of negligence relied on in relation to the defendant and/or its servants acting in the course and scope of their employment. She specifically avers that the defendant was negligent in that it and its servants:

'(a) Failed to ensure that the floor of the shop was clear of spillages;

(b) Failed to adequately monitor the floor of the shop to ensure that any spillages on the floor were mopped up so as not to cause a danger to shoppers;

(c) Failed to put up warning signs to shoppers that there may be spillages on the floor of the shop;

(d) Failed to warn shoppers and the Plaintiff that there was spillage on the floor;

(e) Failed to cordon-off the area where there was spillage until it had been wiped;

(f) Failed to take reasonable steps to prevent harm to the customers whilst, by the exercise of reasonable care, they could and should have done so.'

[5] Both parties called a single witness. Although the plaintiff intended to call her husband to corroborate her evidence, this was not possible as it transpired that throughout the course of her evidence, her husband was seated in court. *Mr Veerasamy*, who appeared for the plaintiff, correctly acknowledged that it would accordingly be inappropriate for him to call the plaintiff's husband to testify.

Exhibits

[6] During the course of the proceedings seven exhibits were handed in being photographs depicting where the incident had occurred inside the Checkers Hyper store as well as correspondence exchanged between the plaintiff, her former attorneys of record N Hedder Attorneys, and her current attorneys of record, and the defendant.

The evidence

[7] The plaintiff, a safety officer testified that on 28 December 2015, she and her family had proceeded to the Checkers Hyper store, Pavilion to purchase chips and cool drinks. She confirmed that they had identified items for purchasing and her husband and three children stood in the queue at the tills waiting to pay.

[8] Whilst standing in the queue, she remembered that she had forgotten to take chips off the shelf and then proceeded with her four-month-old daughter on her hip to the aisle walking away from the till area to fetch the chips. When they had initially walked to the tills and joined the queue she did not observe any spillage on the floor. As she departed from the till area and walked to the aisle to fetch the chips she once again did not notice any spillage on the floor.

[9] She conceded that this was a very busy time in the retail calendar, being Christmas, and many people bustling around inside the store. As she walked away from the aisle having retrieved the items, towards the till area to re-join her family, she slipped on something and fell on her back. She recalls blacking out and when she regained consciousness turned to the left whilst lying on her back and observed her four-month-

old baby daughter, a distance away. The baby was lying face down on the floor and not moving or making a sound.

[10] Because the spillage on the floor was slippery enough she manoeuvred herself whilst on her back to get closer to her daughter, picked her up, and cradled her on her chest. It was at this point that her husband came to her and helped her stand up.She recollects being taken to an office by security where she was subsequently attended to by paramedics. She confirmed that a photograph had been taken immediately after the incident which was handed in as an exhibit that depicts the area where the liquid had fallen. The blue liquid was subsequently identified as Sta-Soft by her husband. She was unaware if any warning signs were present in the area where she fell.

[11] During cross-examination, she acknowledged that there were lots of people around her and she did not observe any spillage on the floor. She could not recollect how much time she had spent in the store before falling. In addition, the plaintiff testified she had no independent recollection of how she fell or that the spillage constituted Sta-Soft. Much of what she was informed of as to how the incident occurred and what she testified to was what she had been told by her husband.

[12] She acknowledged that as one walks away from the aisles towards the till area she would be able to see in front of her and would have been able to observe the spillage on the floor and acknowledged that she did not see it. She also did not notice anything strange about the behaviour of the people in front of her as she proceeded from the aisle to the till area which could alert her to a possible spillage.

[13] Although she could not estimate how long it took, she was certain that it did not take her a long time to proceed from the aisle to the till when the incident occurred. When she and her husband and children walked towards the till for the first time she could clearly see what was in front of her. This was also evident from the photographs. In addition, she could see the floor clearly in the photo in the area where the spillage is depicted save for the fact that on the day in question, there were many people around. She acknowledged

that she did not see the spillage on the floor given the fact that there was a lot of movement around her and also as she was looking around.

[14] During cross-examination, she also acknowledged that on 7 January 2015, she had dispatched a letter to the defendant's store manager the contents of which did not accord with her evidence in court. She confirmed that she had provided instructions to her attorneys in the presence of her husband. The letter that she had dispatched to the defendant was written by both herself and her husband as her husband was explaining to her what had transpired.

[15] She acknowledged that there were discrepancies between her evidence in court and what is disclosed in the letter as after the incident she had blacked out and there were many things that she could not remember which her husband assisted her with. Her husband was the one who ‘filled in the blanks’ and told her what had transpired in relation to what she could not remember because of the blackout.

[16] The plaintiff confirmed that she had no independent recollection of seeing the blue spillage on the floor nor was she aware that it was Sta-Soft. It was her husband who informed her after the incident that the substance was Sta-Soft as he could smell it on her clothing. She agreed that she had no independent recollection of seeing the Sta-Soft or smelling it and did not know what she slipped on.

[17] She understood and appreciated that stores like the defendant must take all steps to keep the store reasonably safe. She had no knowledge of the number of cleaners or staff employed by the defendant on the day in question. The plaintiff additionally indicated that she could not comment on the suggestion that if she slipped on the spillage at all, the probabilities were that the spillage occurred a short time before she slipped on it given her evidence as to what she had done immediately prior to falling.

[18] The area she walked past on her version, she agreed, provided her with three opportunities to observe the spillage on the floor. She confirmed that the store was very

busy and there was a lot of movement of people and it was impossible for her to see what was on the floor. The plaintiff agreed with the suggestion of the defendant, that it was not possible for every spillage to be detected immediately. She declined to comment on the suggestion that the employment of eight cleaners by the defendant who were assisted by staff to monitor the floor area was reasonable. She also declined to comment that it was not possible to have a cleaner walk behind every shopper in the store. That then was the evidence for the plaintiff.

[19] Raakesh Clive Dudhraj (Dudhraj) testified that in 2014/2015 specifically on 28 December 2015 he was the store manager at the Checkers Hyper, Pavilion Shopping Centre. He was present on the day of the incident although he did not actually witness it. A staff member and a security guard informed him of the plaintiff's fall and the spillage. On hearing of this, he immediately went to the area where the incident had occurred. The staff were already present there with the cleaners and security and were cleaning the spillage on the floor.

[20] He confirmed that December is an extremely busy period in the retail calendar and it is among one of the busiest in the year next to Easter. During normal working hours the store receives approximately 6000 to 8000 customers per day and for the month of December approximately 193 000. During his two-year period as a store manager, there were not many incidents which had occurred.

[21] Based on the nature of their business they were aware that spillages might occur and they did not want the public and shoppers to get injured in the store and were intent on providing a safe shopping environment. To this end, the store employed a third party specialised cleaning company which at the time placed six cleaners at the store. The cleaning company had a site supervisor at the store and they as management and the staff at the store also monitored the floor for spillages.

[22] In December and Easter, because it is a high volume trading time, they normally have eight cleaners instead of the six cleaners. There were between 34 to 35 aisles in

the store at the time and approximately 5200m² of trading space. They have a full staff complement of 348 people with between 120 to 150 staff present for the day and 80 staff members being present on the floor at any given time.

[23] On his arrival at the store in the morning, the controller informs management, being himself, and five others of the arrival of the cleaning staff. At approximately 6:00 am when he opens the store he ensures that everyone has arrived for work. Part of his functions are to check on the store and the cleaners. No disciplinary proceedings were instituted against staff members including himself, arising from the incident.

[24] In addition to the cleaners, the 60 to 80 staff members keep an eye on the floor, and that way they keep spillage incidents to a minimum. As soon as the spillage occurs it is attended to immediately. A crate or basket is used to cordon the area off and the cleaners are notified immediately. If a spillage occurs, their internal policy is that it has to be cleared up immediately or within five minutes of the spillage being detected. Either he or a staff member stands by and cordons off the area until it has been cleaned.

[25] The system that they employed worked well as there were no incidents reported. He confirmed that he did not have a conversation with the plaintiff after the incident and indicated that although the plaintiff testified the spillage was on the floor no one warned her and it was undetected, given the time of year in question, it was unlikely that it was not detected and attended to immediately.

[26] He confirmed that he did not have a copy of the contract concluded between the cleaning company and the defendant as the contract was terminated by the head office approximately five years prior to him testifying and no records were kept. The photographs which depict the store is the present configuration of the store and does not depict the store configuration in December 2015. During cross-examination he conceded that he did not have any knowledge of the spill event before he got to the plaintiff and by the time of his arrival, the cleaning staff had already cleared the spillage and he could not tell when the spill had occurred. This concluded the evidence presented.

Analysis

[27] The plaintiff's claim is based on delict and she alleges that the cause of her fall was as a result of the spillage on the defendant's shop floor. The defendant owed her a duty to ensure that the floor of the shop was reasonably safe and was negligent in that it had failed to warn shoppers of the presence of the spillage, failed to monitor the floor of the shop, and detect the presence of the spillage and failed to remove the spillage from the floor.

[28] The defendant admits that the plaintiff had fallen but indicates:

(a) it took all reasonable steps to ensure the plaintiff's and other shoppers safety by keeping the floors clean, it employed an independent cleaning contractor to inspect the floor at reasonable intervals so that a spill could be detected in less than 5 minutes;
(b) that at that time of the year it had approximately 80 staff present on the floor of the store to assist cleaning staff to inspect and monitor the floor and notify them of spillages;
(c) the plaintiff had traversed the area where the spillage occurred on more than one occasion and it was on the third occasion that she had fallen. This is indicative of the fact that the spillage occurred shortly before she fell.

[29] In *MTO Forestry (Pty) Ltd v Swart N.O*.[1] the Supreme Court of Appeal (SCA) set out the elements of a delictual action which the plaintiff must establish to succeed in her claim being (1) the conduct of the defendant of which it complains, (2) the wrongfulness of the conduct, (3) fault on the part of the defendant (in this case in the form of negligence), (4) that she has suffered harm and (5) a causal connection between such harm and the defendant's conduct that is the subject of the complaint.

[30] In *Probst v Pick 'n Pay Retailers (Pty) Ltd*[2], Stegmann J referred to the English law, relying on a decision by Lord Goddard CJ in *Turner v Arding & Hobbs Ltd*[3] which

[1] *MTO Forestry (Pty) Ltd v Swart N.O.* [2017] ZASCA 57; 2017 (5) SA 76 (SCA) para 12.
[2] *Probst v Pick' n Pay Retailers (Pty) Ltd* 1998 (2) All SA 186 W.
[3] *Turner v Arding & Hobbs Ltd [1949] 2 All ER 911 (KB) at 912C.*

addressed the duties owed by a shopkeeper. Concerning the manner in which the onus was to be discharged, the learned judge quoted the following:

'Assistants cannot be expected to walk behind each customer to sweep up anything that he or she may drop, and if this accident had happened at a very busy time when the shop was crowded with people I can well understand that it would be difficult to say that the defendants were negligent because something had got on the floor which they may not have had the opportunity of sweeping up. Here, however, I think that there is a burden thrown on the defendants either of explaining how this thing got on the floor or giving me far more evidence than they have as to the state of the floor and the watch that was kept on it immediately before the accident. I do not mean that it was their duty to have somebody going around watching it, but, in a store of this sort, into which people are invited to come, there is a duty on the shopkeeper to see that his floors are kept reasonably safe.'

[31] In our law however, the approach is different and in this matter, the defendant accepts that it owed the plaintiff a duty to keep the store reasonably safe for use by the plaintiff and other members of the public.

[32] In *Checkers Supermarket v Lindsay*[4] the SCA set out what the applicable test is, namely:

'In our law liability for negligence arises if it is foreseen that there is a reasonable possibility of conduct causing harm to an innocent third party, and where there is an omission or failure to take reasonable steps to guard against such occurrence. The duty of a supermarket owner/keeper to persons entering its supermarket at all times during trading hours is aptly espoused by Stegmann J as follows:

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

[4] *Checkers Supermarket v Lindsay* [2009] ZASCA 26; 2009 (4) 459 (SCA) para 5.

[33] Similarly, Willis J in *Monteoli v Woolworth (Pty) Ltd*[5] concluded the following:

'It seems to me that in the context of a supermarket or something similar, before the presence of produce such as green beans on the floor can give rise to an inference of negligence, there must be some evidence of either a direct or circumstantial nature that the defendant, at the time of the accident:

(i) ought to have taken steps to prevent the presence of beans on the floor from occurring; alternatively,

(ii) knew; or

(iii) ought to have been aware of their presence; and

(iv) failed to take reasonable steps to remove the offending items forthwith.'

What is meant by taking reasonable steps?

[34] Ponnan JA in *Chartaprops 16 (Pty) Ltd and Another v Silberman*[6] found that what is reasonable in the circumstances constitutes a value judgment. The learned judge stated as follows in this regard:

'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*:

"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 inquiry involves a value judgement."' (Footnote omitted.)

[35] Interestingly, it is noteworthy that in *Chartaprops*[7] the shopping mall had contracted the cleaning to a third party, Advanced Cleaning which had a system in place for cleaning the floors. Every part of the floor would ordinarily have been passed over by one or other of the cleaners in its employ at intervals of no more than five minutes. The SCA emphasised that a system whereby a spillage could be detected within five minutes was an adequate system provided the system was adhered to on the day in question.

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[5] *Monteoli v Woolworth (Pty) Ltd* 2000 (4) SA 735 (W) para 37.
[6] *Chartaprops 16 (Pty) Ltd and Another v Silberman* [2008] ZASCA 170; 2009 (11) SA 265 SCA para 48.
[7] Ibid.

[36] Whether or not a cleaning system is sufficient depends on a number of factors including the number of staff allocated to deal with the spillages, the floor area, the number of shopping aisles, the question of the scope of duties of cleaners and the heaviness of the traffic, more susceptible or high risk areas.[8] In *Chartaprops* the court found that it was unreasonable for a spillage which presented on a supermarket floor to be left for a period of half an hour and held that the shopping centre had failed to ensure the spillage was timeously removed, being a period of up to forty minutes during which period the plaintiff had fallen.

[37] I agree with the submissions of *Mr Veerasamy* that all the plaintiff could testify to was the fall. There was also no evidence that she slipped due to inattention save that she acknowledged she was eager to get to the queue in which her husband and children were. The evidentiary burden now shifts to the defendant to demonstrate it has taken reasonable steps to prevent such harm.

[38] *Mr De Beer* who appeared for the defendant accepted that the defendant owed the plaintiff and the public a duty to keep the store reasonably safe. He submitted that the plaintiff's evidence was inadequate specifically relating to establishing two elements of the delictual action. He submitted there was no evidence presented by the plaintiff regarding causation and the harm caused. The totality of her evidence can be summed up as follows: that she was present at the defendant's store, had fallen, and what she experienced during the fall.

[39] During the course of cross-examination, it emanated that she had no personal knowledge as to how she fell, what caused her to fall, and all the information she testified about concerning her fall was conveyed to her by her husband who was not called as a witness.

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[8] See *Stacey v Supercare Services Group (Pty) Ltd* [2018] ZAWCHC 117 para 40; and *Checkers Supermarket v Lindsay* fn 4.

[40] In addition, he submitted that the material contradictions in her version between what she testified to in court, what she pleaded in her particulars of claim and mentioned in correspondence of 7 January 2016 and her letter of demand of 15 May 2016 all relate to what caused her to fall, events which transpired after her fall and the alleged blackout that she had experienced.

[41] He submitted that what is self-evident from her evidence is that she had testified that she traversed the area on two occasions prior to the fall. She and her family had passed the area whilst walking to the till point. When she arrived at the till point after realising that she had forgotten to purchase chips she left the till point area and walked past the area on her way to the aisle whilst her family remained in the queue at the till point. It was on her return from the aisle that she fell.

[42] The plaintiff also acknowledged during the course of her evidence, that she would have seen the spillage on the floor during the first two occasions but did not see anything nor did she observe any other person slipping in the area or anything to indicate that there was a problem with that area. The time that elapsed from her moving from the till point to the aisle and back to the place where she had fallen was indeed a very short time span and importantly she acknowledged that it was possible that the spillage could have occurred during that relatively short time span.

[43] The evidence of Dudhraj, the defendant's store manager was also not challenged by the plaintiff concerning what systems were in place at the time of the incident. Dudhraj's evidence was not disputed in any way specifically that it was designed to detect spillages within five minutes of occurring. I do not agree with *Mr Veerasamy* that Mr Dudhraj did not testify as to what system was I place on the day. Although he did testify that he did not witness the incident he was present shortly after the incident had occurred and on his arrival found the cleaners cleaning the spillage.

[44] His evidence concerning the fact that the defendant had appointed an external cleaning company to deal with the cleaning of the floor and spillages was unchallenged.

He indicated that the system implemented worked and the eight cleaners present on the floor during the December period together with the 60 to 80 staff members were designed to detect any spillage within five minutes. The system he indicated worked as he did not recall an incident of a patron having slipped at the defendant's store with those mechanisms in place. This evidence was unchallenged. What was also unchallenged was his evidence that the system in place was designed to detect spillages within 5 minutes.

[45] I accept that the plaintiff's fall was caused by the presence of a liquid on the floor however, in my view the plaintiff has not demonstrated that this was caused by the negligence of the defendant which caused her to suffer harm. I agree with the submissions of *Mr de Beer* that it is most probable that when viewed in its totality, the spillage occurred during the time that the plaintiff had returned to the shelves having walked past the till points and was returning back to the till point. It was a short period of time. I also accept that as her husband and children were already in the queue she was eager to get back to them.

[46] What is noteworthy about the evidence of the defendant and the undisputed evidence of its witness, Dudhraj is that the defendant had implemented a system to detect spillages, it was effective on the day of the incident and the defendant had appointed extra cleaning staff during its busy seasons being Easter and Christmas.

[47] In addition, the system implemented was reasonably safe and cannot be called into question as it is in keeping with the case authorities. There is no evidence to suggest that the spillage had been left unattended for an extended period.

[48] On the probabilities, the evidence establishes the following: The system relied upon by the defendant at the time involved 8 contracted cleaners on duty together with 60 to 80 staff of the defendant monitoring the floor. The defendant employed an external contractor to attend to the cleaning aspects of the business. The external contractor assigned a supervisor to go around and check. Management and staff who would be

present on the shop floor would also, on a regular basis, check the floors for spillages. During normal times, the defendant would employ six cleaners on a floor, and during the busier festive season, employ two more cleaners. There were approximately 120 to 150 employees present on duty for the day.

[49] With the system being employed, a spillage could be detected within five minutes. The store was busy at the time, given it was the Christmas period, and on the plaintiff's own evidence, a number of people, including herself, traversed the area where she fell. She had traversed the area on 3 occasions, and on the third occasion, she slipped, while no one else had slipped in that area. The plaintiff did not see the spillage nor was she aware of how she fell; all she could testify about was what occurred after her fall. The defendant's system enabled them to detect spillages within 5 minutes. The plaintiff fell and was assisted immediately by her husband and staff of the defendant. On Dudhraj's arrival, the spillage was being cleaned by his cleaning staff. The plaintiff's evidence was that she had taken the same route on the two occasions prior to falling.

[50] The plaintiff’s evidence is singularly unhelpful as she does not indicate what she was doing immediately before she fell – all one knows is that the store was busy, she was surrounded by shoppers and did not see anything.

[51] In my view the defendant has discharged its evidentiary burden to show the system in place was reasonably safe and would ensure spillages were detected on the day in question in a relatively short space of time.

[52] Much was made by *Mr Veerasamy* of the fact that the defendant did not lead evidence concerning the contract, its terms, and whether there had been compliance therewith. Dudhraj’s evidence was to the effect that the contracts could not be located given the passage of time. In addition, I agree with the submission of *Mr De Beer* that the facts of this matter in relation to the contracts differ from that which prevailed in *Avonmore Supermarket CC v Venter*.[9]

[9] *Avonmore Supermarket CC v Venter* [2014] ZASCA 42; 2014 (5) SA 399 (SCA).

[53] There is no indication that the contract was terminated due to adverse conduct on the part of the cleaning contractor and the only evidence available is that of Dudhraj. In addition, he confirmed that there were no incidents that had occurred involving the cleaning company which had been contracted whilst he had been employed at that store.

[54] Given the facts, when viewed in the light of the decisions in *Chartaprops*[10], *Lindsay*[11], and *Williams*[12], the defendant, in my view, has discharged the onus that it had a reasonably safe and effective system in place on the day to prevent harm. In my view regrettably, the plaintiff has not discharged the onus of proving that the incident was caused as a consequence of the negligence of the defendant;

Costs

[55] There is no reason to depart from the usual rule that the successful party is entitled to its costs and never was it suggested otherwise. In addition, on 16 October 2023 the trial was adjourned to 28 November 2023 for closing arguments with costs in the cause.

Order

[56] In the result, the following order will issue:

1. The plaintiff's claim is dismissed with costs.

HENRIQUES ADJP

[10] *Chartaprops 16 (Pty) Ltd and Another v Silberman* fn 6.
[11] *Checkers Supermarket v Lindsay* Fn 8.
[12] *Williams v Pick n Pay Retailers (Pty) Ltd and another* [2023] ZAWCHC 229

Appearances:

For the plaintiff:	I Veerasamy
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For the defendant:	W A De Beer
Instructed by:	Walley & Van Der Lith Inc Ref: Roland Bottin/nh/A0054/1090 c/o **Gavin Price Attorneys** 199-201 Percy Osbourne Road Morningside, Durban Email: roland@wvl.co.za Tel: 011 880 3473
Date of Trial:	16 October 2023
Date of Argument:	28 November 2023
Date of Judgment:	14 June 2024

This judgment was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date and time for hand down is deemed to be 9h30 on 14 June 2024.