IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case Number:994/2019

In the matter between:

ELORÉZE PIETERSE	**Plaintiff**
and	
FLM SA (PTY) LTD	**First Defendant**
JOSEPH REYNOLDS CHEMALY N.O.	**Second Defendant**
MICHAEL NICOLAS GEORGIOU N.O.	**Third Defendant**
ADRIANA GEORGIOU N.O.	**Fourth defendant**

CORAM: **VAN RHYN J**

HEARD ON: **15 AUGUST 2023, 16 AUGUST 2023 and arguments on 20 NOVEMBER 2023**

DELIVERED: **5 FEBRUARY 2024**

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[1] On 30 April 2018 Mrs Eloréze Pieterse, the plaintiff, attended at Food Lover's Market ("FLM") situated at Showgate Centre, Curie Avenue, Bloemfontein when she fell on the sidewalk or passageway leading to the entrance of FLM. She sustained bodily injuries and suffered damages as a result of the incident. She instituted action on 4 March 2019 against FLM as the only defendant. Subsequent to the filing of FLM's plea, the plaintiff amended her particulars of claim to include, cited as the second, third and fourth defendants, the trustees of the Michael Family Trust (registration Number TMP 2502) (the "Trust").

[2] In her amended particulars of claim the plaintiff pleaded that FLM conducted and operated a business at and from the premises occupied by it and known as shop 21 and 21a in the building known as the Showgate Centre. It is furthermore pleaded that the Trust is, and in particular on 30 April 2018, the lessor/landlord/owner of the premises occupied by FLM. The plaintiff alleges that she fell as a result of uneven and unsafe paving on the sidewalk or passageway directly in front of- and leading to- and providing access to the business premises of FLM.

[3] The plaintiff alleges that FLM and the Trust had:

3.1 a legal duty to ensure that the exterior sidewalks, walkways, passageways and entranceways and entrances leading to and providing access to the business and the premises were properly maintained and were in a safe condition;

3.2 a legal duty to warn and caution members of the public in general, including clients, patrons and invitees of any dangerous situation which might exist in respect of the exterior of the premises including the sidewalks, walkways, passageways and entranceways and entrances leading to and providing access to the business and its premises, which situation might pose a risk or cause damages to members of the public in general, including clients, patrons and invitees; and

3.3 ought reasonably to have foreseen that if the exterior in the immediate vicinity of the premises, including the sidewalks, walkways, passageways and entranceways and entrances leading to and providing access to the business premises were in a poor condition and not properly maintained, members of

the public in general, including clients, patrons and invitees, might suffer damages as a result of bodily injuries or otherwise.

[4] The plaintiff pleaded that the incident was caused due to the negligence of either or both FLM and/or the Trust in that it/they *inter alia* failed to:

4.1 ensure that the sidewalks, walkways, passageways and entranceways and entrances leading to and providing access to the business and the premises, in particular in the direct vicinity of the main public entrance, were in a safe condition for use by members of the public intending to enter the business premises;

4.2 repair or cause to be repaired uneven paving on the sidewalks, walkways, passageways and entranceways and entrances leading to and providing access to the business and the premises, in particular directly in front of and providing access to the premises;

4.3 exercise the necessary care in regularly inspecting the sidewalks, walkways, passageways and entranceways and entrances leading to and providing access to the business and the premises, in particular in the direct vicinity of the main public entrance, in order to ensure that they were safe for use by members of the public in general, including clients, patrons and invitees;

4.4 warn and caution the members of the public in general, including clients, patrons and invitees of the potential risks of utilizing and/or walking on the uneven and/or unsafe paving on the sidewalks, walkways, passageways and entranceways and entrances leading to and providing access to the business and the premises, in particular in the direct vicinity of the main public entrance; and

4.5 act with the due diligence regarding the safety of all persons entering the premises;

4.6 being aware of or in the circumstances ought to have been aware of the unsafe and uneven paving on the sidewalks, walkways, passageways and entranceways and entrances leading to and providing access to the business and the premises, in particular in the direct vicinity of the main public entrance,

they failed to take steps to rectify same or to warn and caution members of the public of the potential dangers and risks attached to using or walking on such uneven paving when approaching or entering the main public entrance to the business premises.

[5] As a result of the incident the plaintiff suffered various bruises and abrasions on her knees and palms, acute thoracic outlet syndrome with a vascular compression, injuries to her ribs and back. She claims an amount of R433 509.36 in respect of past medical expenses, future medical expenses and general damages.

[6] FLM's defence is essentially that it only has a duty to ensure that the interior of the premises occupied by it are reasonably safe for members of the public. In terms of the lease agreement with the Trust, it as the lessor, is responsible and has the exclusive control of the "common areas which includes the foyers, malls, arcades, passages, parking areas, entrances, exits, loading docks, landscape areas, interior and exterior stairways, toilets, ramps and all other amenities provided by the lessor."

[7] FLM specifically pleaded that the area where the incident occurred is outside FLM's premises and it had no legal duty in respect of and was not in control of the area where the alleged incident occurred in terms of the lease agreement with the Trust. In the event of it being found that the incident occurred within the area of FLM's control and/or responsibility, then and in that event FLM pleads that it took all reasonable and necessary steps to ensure that its premises was reasonably safe for members of the public in that FLM performed regular inspections of the property to locate any hazards and that the alleged incident was not reasonably foreseeable.

[8] FLM expressly denied that the incident occurred. Further, in the event of it being found that the incident occurred in an area under FLM's control or responsibility and that the incident was reasonably foreseeable, such negligent conduct was not causally related to the alleged incident. In the further alternative and in the event of a finding that the incident did occur in an area under FLM's control and that the incident was reasonably foreseeable, the sole cause of the plaintiffs alleged fall and injuries was due to the negligence of the plaintiff who was negligent in that she, *inter alia*, failed to walk with due care, walked in an area where she ought to have known that she needs to step carefully and failed to do so, wore inappropriate shoes taking

into consideration her age and mobility, failed to keep a proper lookout and walked hurriedly.

[9] The Trust admitted that the plaintiff visited the premises as averred and that an incident occurred involving her. The Trust denies that it had a legal duty on the basis pleaded by the plaintiff or that the incident occurred as a result of the negligence of the Trust.

[10] The Trust furthermore relies on a “disclaimer notice” which was prominent at the entrances to the premises and/or the exterior of the building which were visible to the public at all relevant times and by entering the premises and approaching the property or building, the plaintiff expressly and/or tacitly accepted the disclaimer and is bound thereby with the result that the Trust is exempted from any claim of whatsoever nature in respect of loss, damage, expense, injury or death howsoever caused. The premises referred to in the disclaimer notice includes the exterior sidewalks, walkways, passageways and entrance ways leading to and providing access to the property or building.

[11] In the event that it is found that the Trust had a legal duty and were indeed negligent, the Trust pleads that such negligence did not contribute to the incident occurring and/or that the incident was not reasonably foreseeable. In the event of it being found that there was a legal duty of care which rested on the Trust and that it was negligent and such negligence contributed to the incident and that the incident was reasonably foreseeable, the Trust pleads that it took all reasonable and necessary steps to ensure that the premises, including the exterior sidewalks, walkways, passageways and entrances leading to and providing access to the property or building was reasonably safe for members of the public and the plaintiff by, *inter alia*, performing regular inspections of the property to locate potential hazards.

[12] If it was found that the Trust had a legal duty of care, that it was negligent, that the incident was foreseeable and that the negligence was the cause of the Plaintiff’s damages, then it is alleged that the plaintiff was also negligent and that her negligence was a contributing factor to the causing of the incident, in that she failed to keep a proper lookout, she failed to take reasonable steps to avoid the occurrence

and she failed to act with due care and that her claim should be apportioned as per the Apportionment of Damages Act[1].

[13] The parties agreed to separate the issue of the liability from the quantum in the result that the trial continued only in respect of the liability issue. The plaintiff testified that she is a house wife and 55 years of age. It is therefore safe to assume that she must have been 50 at the time of the incident on 30 April 2018. At approximately 09h30 she and her husband arrived at the Showgate Centre. A series of 8 photographs depicting the exit and entrance to FLM, the parking area and shoes similar to the ones worn by the plaintiff on the day in question, were tendered during evidence and were referred to by the witnesses during the trial. These photographs are contained in plaintiff's photo bundle, Exhibit "B".

[14] The plaintiff's husband parked their vehicle in one of the allocated parking bays, indicated with a red cross on photo 15. Her husband remained in the parked vehicle and the plaintiff walked from the vehicle to the entrance of FLM. She was not in a hurry at the time. She had previously visited this particular branch of FLM but is not a regular customer in the sense that she normally goes to the FLM branch situated at Langenhoven Park which is closer to their place of residence.

[15] The parking area is paved with grey coloured paving stones/bricks. The plaintiff walked in a diagonal direction from the motor vehicle, passing the exit of FLM, to the entrance of FLM as indicated with a red line on photograph 15. She stepped up a curb stone, visible on photo 2, onto a paved walkway towards the entrance of FLM. The walkway in front of the wall of the building leads from the entrance of FLM, situated on the left side of the building, to the right side of the building, where the exit from FLM is situated.

[16] The curb stone separates the parking area from the walkway towards the main entrance. The walkway is paved with the same paving stones as the parking area. The curb stone is painted yellow as is visible on Photo 2. There is no curb stone in front of the entrance to FLM. A low concrete ramp, obviously to provide easy access for disabled persons and trolleys, leads to the entrance of FLM.

[1] Act 34 of 1956.

[17] After she stepped up the curb stone onto the walkway, the plaintiff turned to her left and proceeded 3 to 4 steps towards the entrance of FLM when she stumbled as a result of her foot getting stuck and she fell forward. A circle on Photo 2 and marked “X2” indicates the area, more or less, where she fell. The plaintiff testified that she was wearing flat, rubber soled shoes at the time of the incident. The security guard who was standing next to the entrance of FLM came to assist her and helped her to her feet.

[18] At that stage she had no idea what had caused her to fall but she assumed that the front of her shoe had caught or hooked onto something. The plaintiff testified that she has no problems with her eyesight or her balance. She is not overweight. She often walks on uneven terrain on the farm and on hikes and has never fallen before.

[19] The plaintiff then entered the premises of FLM and reported the incident to an employee, Nicky Swanepoel (“Swanepoel”) at the cash registers. The plaintiff was assisted and accompanied by Swanepoel to her husband who was still waiting in the vehicle. After exiting the building and on their way to the vehicle, the plaintiff pointed to Swanepoel the general area where she had fallen. The plaintiff testified that she experienced pain and discomfort as a result of the incident. She sustained injuries to her ribs, knees, left shoulder and her back.

[20] When the plaintiff was referred to photo 3 by Mr Louw, counsel on her behalf, she testified that it was difficult to identify the precise place where she had fallen but indicated that it was on the other side of the person appearing on the photo wearing long black pants. Photo 3 is taken from inside of FLM towards the entrance door with a view of the walkway leading to the entrance. She explained that she did not provide photo 3 to her attorney and was unable to say who took the photograph.

[21] On the day of the incident, at around 18h00, she and her husband returned to the premises because she wanted to ascertain where exactly she had fallen and what had caused her to fall. She noticed a paving stone that was raised at one of its four corners. She photographed the raised paving stone, photo 13. She marked the specific paving block “X3” on photo 13 and testified that it is the same spot marked “X2” on photo 2, being the spot where she fell. According to the plaintiff, she assumed that if a dangerous situation or risk existed, FLM would have placed something like a trolley or a cone at the spot to warn the public about the danger.

[22] She testified that looking at the paving afterwards, it is quite clear that the paving is uneven. Mr Louw, questioned the plaintiff whether she noticed or observed anything that might cause a risk or danger on the day of the incident. The plaintiff responded by explaining that because she was approaching the entrance of FLM, she was not looking towards the ground. She was focusing on entering the building and was looking ahead while walking and therefore she did not notice anything of the sort. During the trial the plaintiff testified in Afrikaans. I find it apposite to quote her evidence verbatim. (“My fokus was om by die winkel te kom. Ek het nie my oë op die vloer gehou om te kyk waar is iets fout nie. Ek stap doelgerig om in te gaan”). The plaintiff testified that when she returned to the scene at 18h00 on the day of the incident, and as can be seen from photo 13, the paving is clearly uneven.

[23] The plaintiff testified that she did not notice any disclaimer notices at the time of the incident. She noticed a disclaimer notice afterwards which notice is posted near the exit door at the premises of FLM. According to her it does not make any sense to place a disclaimer notice near the exit door. It should have been posted at the entrance to the building. The plaintiff returned to FLM on 2 or 3 May 2018 and discussed the incident with Mr Andrew Whitehouse, the manager at FLM. She wanted to ascertain whether she can consult a medical practitioner because she has no medical insurance/aid. Mr Whitehouse told her to consult with a doctor because she cannot live in pain. (“Mevrou u moet dokter toe gaan. U kan nie so in pyn lewe nie”).

[24] Mr Whitehouse gave her a document titled “Internal Accident/Incident Investigation Report”, referred to as the “Incident Report” to complete and return to him. She completed the Incident Report, dated 3 May 2018 and submitted same to the management staff at FLM. The time of the incident was recorded as 09h34 on 30 April 2018. The plaintiff noted that she fell in front of the shop as a result of lifted paving stones. (“Het by Fruit & Veg voor winkel geval a g v pavingstene wat opgelig is”).

[25] During cross examination by Mr De Beer, counsel on behalf of FLM, the plaintiff conceded that she only realized why she had fallen when she, on the same day of the incident, returned to the area at around 16h00. She cannot recall whether any items were displayed for specials against the wall of FLM at the time of the incident

as depicted on photo 2. She did not fall at the entrance to FLM or right in front of the entrance. Immediately after she had fallen, she did not endeavour to ascertain the reason for her falling because of pain and discomfort. She also did not show the specific area to Swanepoel when they exited the building on the way to the vehicle.

[26] The plaintiff did not take any measurements at the location where the incident occurred. Mr De Beer questioned the plaintiff regarding the entries made on the Incident Report, in particular question 16: “What are the basic causes for this incident?” and the plaintiff’s response that the paving stones were uneven right in front of the entrance. (“Die pavingstene was ongelyk, reg voor die ingang”).

[27] The Plaintiff, in an effort to explain where exactly she fell and with reference to photo 2, testified that to the left of the curb stone, the curb stone levels out as a result of a low ramp that leads to the entrance of FLM. Shortly after she had stepped up the curb stone to the level of the walkway and had turned to her left on the way to the entrance, she realised that she acted rather “stupidly” by not walking a little further to the left and up the ramp. It would then not have been necessary to step up the curb stone. Only a few steps after she realised that she had failed to notice the ramp leading to the entrance, she stumbled and fell.

[28] When she and her husband returned to the scene she saw the lifted paving stone. She knew that the specific paving stone, depicted as “X3” on photo 13 was the “culprit” that caused her to fall. She then took two or three photographs of which photo 3 clearly shows the raised paving stone. She would have shown the specific photograph to her attorney when she explained to him what had happened.

[29] The plaintiff testified that she was not the photographer and did not provide photographs 1- 4 and 14-15, contained in exhibit “B”, to her attorney. She confirmed that the area depicted in photo 3 and photo 4 is not the area where she fell. She could not provide an explanation for the purpose of a small cross visible on photo 3, the small cross being just behind the person wearing black trousers.

[30] The plaintiff was unable to explain why, in relation to a question by FLM in its preparation for the trial whether the plaintiff admits that the area where the purported uneven and unsafe paving was located was on a passage on the property, the response was as follows: “Plaintiff admits that the uneven and unsafe paving was

located at the entrance to the property leased by the First Defendant. A photo of the area where the incident took place is appended hereto marked Photo 3". Appended to the answer filed in response to the question by FLM, is photo 3 which, according to the testimony of the plaintiff does not indicate the location where she fell.

[31] The plaintiff was unable to give any measurement of the height at which the paving stone was raised above the other paving stones. According to her it was clearly visible because "…dit het baie duidelik uitgestaan. 'n Mens kon dit op 'n afstand sien toe ons daar aankom toe sien ek die spesifieke steentjie". In response to an allegation that the landlord regularly maintains the paving, she stated that there were various places where pieces of paving were missing or the paving stones were uneven. It was put to her on behalf of FLM that a witness, Christene van Deventer, will testify that in the period between 19 March 2018 to 23 March 2018 she inspected the area between the exit and the entrance to FLM and she did not notice any unsafe area and no other incidents were reported pertaining to the exterior or the paving. The plaintiff responded that the area is really in a "bad shape".

[32] During cross examination by Mr van der Merwe, counsel on behalf of the Trust, the plaintiff explained that she did not mark the item "failure to warn" on the Incident Form because she did not peruse the form thoroughly because her knowledge of the English language is not that good. She did however mark the section indicating that "inadequate guards/barriers" were erected at the scene where the incident occurred. Regarding the disclaimer notice on photo 14, she confirmed that she stepped up to walkway at the place where the disclaimer notice is affixed to the wall. She conceded that the disclaimer notice was noticeable and visible, clear and legible. She was aware of what the purpose of an indemnity or disclaimer notice was.

[33] Even though she wrote on the Incident Report that the paving was uneven right in front of the entrance the reference to "reg voor" was intended to describe the area between the entrance and the exit of the building. She denies that she was contributory negligent or negligent on the day in question. In re-examination she explained that she did not see the disclaimer notice. Her attention was not captured by the disclaimer notice, her attention and focus were captured by the presence of the security guard at the entrance to the building. According to the plaintiff, the averment that she was negligent by not walking with due care or failed to keep a

proper lookout is nonsense (“Dit is sommer nonsense”). This concluded the evidence proffered by the plaintiff.

[34] FLM presented the testimony of Christina van Deventer (Van Deventer”), Divisional Project Manager of FLM. She testified that she visits branches of FLM with the purpose of conducting “safety checks”. She performed these tests regularly at both of FLM’s premises in Bloemfontein. She visited the particular branch of FLM at the Showgate Centre on average once a month and completed a safety check approximately a month before the incident. During her inspection she walks around the store, inspect the loading area and the interior of the shop to ascertain whether everything is in order and to ascertain whether any hazardous or dangerous objects or situations exist.

[35] She was unable to recognize what is depicted on photo13 and has never seen the raised paving or uneven paving. Subsequent to the incident involving the plaintiff she visited the particular branch of FLM again during June 2018 and again did not notice any unsafe or hazardous situation. The outside of the shop (FLM) is the responsibility of the landlord and audits are only done in respect of the inside of the shop in accordance with clause 10 of the lease agreement with the Trust. She was assigned to the Showgate Centre branch during 2016 and is not aware of any other similar incidents, except for one incident which occurred on the inside of the premises.

[36] During cross examination by plaintiff’s counsel Van Deventer explained that the term “common areas” means the “public area”. However, FLM also conducts business on the common area as depicted on photo 2. Some of FLM’s merchandise consisting of wooden pallets with bags of oranges, other goods and bags containing charcoal are displayed against the wall, on the walkway leading to the entrance on photo 2.

[37] FLM is required to compile an Incident Report as part of the records which it keeps regarding its safety regulations. A safety and health representative of FLM, referred to as the SHE-representative, must complete an Incident Report and FLM keeps a register regarding incidents or accidents. When Van Deventer visited FLM during June 2018 she learned about the incident involving the plaintiff. The witness, with reference to a form with the heading “Public Liability Accident Report Form” (the “Public Liability Report”) explained that the manager completed the form and signed the form on 7 May 2018. The date and time “of loss” is noted as 30 April 2018 at

"Food Lovers Showgate". How exactly the incident occurred is recorded as follows: "Paving moved due to heavy vehicle. Customer tripped on raised paving. Please see attached photo." The photograph appended to the form depicts the entrance to FLM's premises. Again this photograph does not depict the area where the plaintiff fell. The Public Liability Form is submitted for insurance purposes.

[38] During cross-examination by Mr van der Merwe, Van Deventer explained that a palette jack is used to convey products which are too heavy to carry. However, a pallet jack is not a "vehicle". Her testimony in this regard refers to the indication on the Public Liability Form that the paving was moved due to a heavy vehicle. No further evidence pertaining to the possible use of a pallet jack or a heavy vehicle which could have caused the paving to move was presented during the trial. This concluded the evidence in respect of FLM.

[39] Mr Harold Verster ("Verster"), a witness called on behalf of the Trust, testified that he was appointed to oversee the property portfolio of the Trust and he oversees approximately 42 buildings which are used for warehousing and commercial purposes. At the time of the incident during April 2018, he was employed by the Trust as a maintenance officer. Due to the number of properties in the property portfolio of the Trust it is not possible to do maintenance checks on a daily, weekly or even a monthly basis and therefore the tenants are obliged to report any issues of concern through a call centre. During April 2018 inspections were performed at the Showgate Centre every 3 months.

[40] In the event of a report regarding a maintenance issue, a job card is completed and the issue is attended to at the soonest opportunity. The property manager does a check-up every three months. Verster testified that the Trust did not receive a report regarding the incident involving the plaintiff during 2018 and no repairs to the paving stones were done as a result of the incident. The Showgate Centre extends over nearly 20 000 square metres and it is not possible to check all the paving stones every day. The disclaimer notice, on the wall next to the exit door of FLM, represents one of several disclaimer notices which are put up throughout the Showgate Centre and relate to the general areas and not the interior of the FLM premises. The purpose of these notices is to inform patrons and visitors to the Showgate Centre to be careful where they go in relation to the general areas.

[41] During cross examination by Mr Louw, Verster testified that according to him, the condition of the paving depicted in photo 4 is fair and the condition of the paving depicted in photo 13 is acceptable and does not pose a dangerous or a hazardous situation. If the paving was damaged by a pallet jack, the Trust would have seen to the repairs to the general area, but if the damage was caused by one of FLM's own vehicles, FLM would have had to effect the repairs. It remains the responsibility of the tenant being in this case, FLM, to report any maintenance issue to the Trust.

THE APPLICABLE LEGAL PRINCIPLES AND THE ARGUMENTS ON BEHALF OF THE PARTIES.

[42] The plaintiff's claim for damages is based on the *actio legis aquiliae* and in order to succeed on the issue of liability, she must prove the following:

42.1 the commission or omission of an act (*actus reus*) by the defendant(s);

42.2 which is unlawful or wrongful (wrongfulness). Wrongfulness can manifest itself in different breaches of which breach of a duty of care is but one.

42.3 negligence;

42.4 which results in or causes the harm (causation); and

42.5 the suffering of injury, loss or damage.

[43] An act which causes harm to another is in itself insufficient to give rise to delictual liability. For liability to follow, prejudice must be caused in a wrongful (legally reprehensible or unreasonable) manner. To determine wrongfulness a dual investigation is to be followed: firstly, to determine whether a legally recognised individual interest has been infringed and caused a harmful result and secondly, if so, legal norms must be used to determine whether such prejudice occurred in a legally reprehensible or unreasonable manner.

[44] The general norm or criterion to be employed in determining whether a particular infringement of interests is unlawful, is the legal convictions of the community: the *boni mores.*[2] The *boni mores* test is an objective test based on the criterion of reasonableness. *Boni mores* concerns the legal convictions of the community which

[2] Cape Town Municipality v Bakkerud 2000 (3) SA 1049 (SCA).

serve as a yardstick to establish whether or not the community regards a particular act to be delictually wrongful (the "reasonableness criterion"[3]).

[45] In cases concerning liability for an omission, wrongfulness is normally determined by asking whether the defendant had a legal duty to prevent the loss because, according to the *boni mores* criterion, there is neither a general duty to prevent loss to others by positive conduct, nor a general duty to prevent pure economic loss. The reason being the imposition of such duties would probably place too heavy a burden on individuals in the community.

[46] The plaintiff relies upon FLM's and the Trust's alleged failure to take various steps, *inter alia*, their failure to ensure that the sidewalks, passageways and entranceways leading to and providing access to FLM, in particular in the direct vicinity of the entrance, were in a safe condition for public use. In **Regal v African Superslate (Pty) Ltd**[4] the Appellate Division held that control over the maintenance of a building is an important consideration in establishing whether a defendant's omission amounts to unlawful conduct. Firstly, the court must decide whether the omission was unlawful and if so, whether it was also negligent.

[47] The test for negligence remains that enunciated in **Kruger v Coetzee**,[5] where the erstwhile Appellate Division stated:

> "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."[6]

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[3] Natal Fresh Produce Growers' Association and Others v Agroserve (Pty) Ltd and Others 1990 (4) SA 749 (N) at 753H-J.
[4] 1963 (1) SA 102 (A).
[5] 1966 (2) SA 428 (A).
[6] At 430E-F.

[48] The plaintiff contends that both defendants, FLM as business owner and in control of the premises or area where it conducted business, as well as the Trust (on the basis of being in control of the premises) have a common law duty of care towards patrons and the general public present and commuting on the premises known as Showgate Centre. With reference to **Both v Post Office Café Bazaar CC**[7] Mr Louw contends that an obstruction of some sort must have caused the plaintiff to stumble and fall.

[49] Mr Louw argued that the plaintiff testified that she had never seen the disclaimer notice either on the day of the incident or prior to it. The Trust did not ensure that the contents of the disclaimer notice will come to the attention of patrons and the general public who attends at the Showgate Centre. The inescapable conclusion is that FLM and the Trust are liable for the plaintiff's damages.

[50] Mr de Beer argued that FLM is not responsible for the maintenance of the outside area, retains no remedy should it suffer any damages resulting from a lack of maintenance or repair to the outside area and does not exercise control over the outside area. Therefore, the imposition of liability in these particular circumstances would be unreasonable, it would be limitless and would exist in abstract. Regarding the plaintiff's testimony as to where exactly she fell, FLM contends that the plaintiff has not proven the cause or location of her fall and therefore there cannot be a question of negligence. The plaintiff failed to keep a proper lookout and was negligent in respect of her fall.

[51] Mr van der Merwe argued that it is common cause that FLM conducted its business on the outside of the premises in front of the entrance. It seems as if FLM traversed the area with a pallet jack which FLM was not authorised to do. FLM acted outside the scope of the lease agreement by exercising physical control of the area where the incident occurred and therefore cannot rely on the clause in the lease agreement which places an obligation on the Trust to maintain the areas which are not occupied by FLM as a self-standing ground to avoid liability *vis à vis* the plaintiff.

[52] However, the Trust contends that the plaintiff has failed to discharge the onus of proving what the cause of the incident was and where the incident occurred. In any event, the plaintiff was aware of what the purpose of an indemnity notice is. She had previously noticed such notices at similar establishments. The plaintiff conceded that

[7] [2009] JOL 24631 (GSJ).

she had seen the disclaimer notice before the incident occurred and that the disclaimer notice is noticeable, clear, legible and visible. The Trust moves that the plaintiff's claim against the 2nd, 3rd and 4th defendants be dismissed with costs.

EVALUATION OF THE EVIDENCE AND CONCLUSION.

[53] A negligent omission giving rise to damages is unlawful only if it occurs in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm.[8] The narrow question is whether the legal convictions of the community require FLM and/or the Trust to properly maintain the paving on the walkways/passageways to prevent its/their patrons or visitors to the Showgate Centre an incident experienced by the plaintiff. If so, then the failure to do so constitute wrongful conduct on the part of either FLM or the Trust or both.

[54] The basis for FLM's occupation of the premises and its presence at the Showgate Centre is the lease agreement. The Mangaung Metropolitan Municipality is the owner of the land and the Trust leases the Showgate Centre. Members of the public utilise the parking area and walkways at the Showgate Centre to visit a multitude of shops, and commercial businesses situated at this particular shopping centre. Evident from the agreement is the fact that FLM occupied and conducted its business from the interior of shop 21 and 21a ("the leased premises"). Therefore, FLM was responsible for the maintenance of the interior of the leased premises and would, in terms of the agreement and at its own expense, repair and maintain the leased premises.

[55] In terms of clause 10(A)(a) of the lease agreement the Trust would keep and maintain only the exterior structure, roof, gutters, and down pipes of the building and any lifts, passages or other common services in the building in good order and condition. In terms of the agreement FLM has no claim against the Trust for any loss or damage which it may suffer by reason of the property, being the land and the building, or any part thereof being in a defective condition or any particular repair or maintenance not being effected by the Trust. FLM's argument is thus that the alleged incident occurred outside the leased premises, in a common area, over which the Trust has control over and is responsible for the maintenance thereof.

[8] Administrateur, Natal v Trust Bank van Afrika BPK 1979 (3) SA 824 (A)

[56] The question is whether the fact that FLM used a section of the walkway, against the wall on the outside of the leased premises/shop being part of the common area, for displaying merchandise and advertising its products, leads to a conclusion that FLM took control of and occupied the area and that the lease agreement as a result thereof, does not come to the aid of FLM at all as the agreement is *res inter alios acta.* To impose liability upon FLM to maintain the passageway leading to the entrance or the exit or even a certain area of the parking area as a result of merchandise being displayed in this area, would, to my mind, be unreasonable having regard to the facts of the matter.

[57] The imposition of liability would have been different when, for example, the plaintiff ripped over a bag of potatoes on the passageway to the entrance which one of the employees of FLM dropped and failed to remove. Or one of the many display boards advertising FLM's products fell on a customer due to the fact that it was not securely fastened by FLM.

[58] The evidence does not support an inference that FLM or its employees caused damage to the paving at the outside of the leased premises. Reference to a heavy vehicle was made in the Public Liability Form which had to be submitted in terms of an insurance policy. I agree with the argument on behalf of FLM that the use of the area against the wall of the premises and the walkway next to the wall leading to the entrance of FLM to advertise its merchandise and to display certain products did not attract control and responsibility pertaining to the maintenance of the paving stones. The plaintiff solely relies upon the allegation that the issue of wrongfulness arises from the fact that FLM was a tenant and operated its business from the premises. I am of the view that control and responsibility in respect of the outside of the leased premises, specifically pertaining to the responsibility and maintenance of the walkway leading to the entrance of FLM, remained with the Trust.

[59] The plaintiff testified that she returned to the Showgate Centre at 18h00 on the day of the incident to ascertain what had caused her to fall earlier that morning and to take photographs. She did not explain why she considered it necessary to take photographs. When she returned to the area she immediately saw the lifted paving stone depicted on photo 13. The single lifted paving stone was immediately visible and "stuck out like a sore thumb". The incident occurred on 30 April 2018 with the

result that at the time when the plaintiff returned to the Showgate Centre at 18h00 it must have been close to sunset.

[60] To my mind doubt and uncertainty exists as to the precise location where the plaintiff fell. If the lifted paving stone was in fact the "culprit" as identified by the plaintiff at around dawn on the day of the incident, why did she indicate in her reply to a request for admissions dated 11 April 2022, that the incident occurred at the entrance to the property with reference to photo 3. On photo 3 the entrance to FLM is depicted. This was not where she fell according to her testimony. She furthermore indicated in the Incident Report that the reason for the incident was that the paving stones ("pavingstene") were uneven right in front of the entrance. Her answer is capable of only one reasonable interpretation, namely more than one paving stone were uneven right in front of the entrance and had caused her to fall.

[61] The confusion regarding the reason for her stumbling and falling is exacerbated by the information contained in the Public Liability Report contained in the plaintiff's trial bundle. Even though the form was not completed or signed by the plaintiff, the information had to be provided by her, or the security guard who stood at the entrance at the relevant time or Swanepoel, who did not witness the incident. In this document it was recorded that the "Paving moved due to heavy vehicle. Customer tripped on raised paving. Please see attached Photo". Van Deventer testified that the photograph appended to this form depicts the immediate entrance of the leased premises, being the area similar to photo 3, contradictory to the area where the plaintiff fell according to her testimony in court.

[62] Mr Louw, with reliance on **Both v Post Office Café Bazaar** argued that the evidence clearly indicates that the plaintiff tripped and fell forward which could only mean that there must have been some obstruction which caused her to fall. She did not slip and fall backwards. In **Both v Post Office Café Bazaar** the plaintiff claimed damages as a result of her having tripped, stumbled and fallen at a Spar Supermarket at Brakpan. The following day she returned to the supermarket with a witness to ascertain the reason for the incident. The plaintiff requested the witness to slide her feet across the floor where she had fallen to detect if there was any obstruction. The witness then pointed "…a tile that protruded in a corner, some half a centimetre to a centimetre above the rest of the tiles that were on the floor. This, the plaintiff seems to suggest, was the obstruction that

caused her to trip and fall. Some considerable time later, she returned to the store with her attorneys but it seemed that the protruding tile had been "made good".[9]

[63] The facts in the Both matter is distinguishable form the matter at hand in the following respects:

63.1 The evidence in **Both** was that the tile was protruding some half a centimetre to a centimetre above the rest of the tiles.[10] In the matter at hand there is no evidence pertaining to the degree or height of the raised paving stone(s);

63.2 The incident in the **Both** matter was recorded on closed circuit television which subsequently "disappeared"[11];

63.3 The plaintiff in the **Both** matter called a witness who confirmed, in every material respect, the evidence of the plaintiff relating to the discovery of the protruding tile in the corner. *In casu,* the plaintiff did not present the testimony of her husband, who accompanied her on the same day of the incident, to testify regarding the discovery of the raised paving stone when they visited the scene at 18h00. Taking the plaintiff's evidence and her injuries into consideration, the plaintiff's husband would in all probabilities have joined her in her endeavour to ascertain what had caused her to fall;

63.4 The "partner" at the Spar in the **Both** matter denied that there was any protruding tile and denied that any protrusion had been fixed after the incident.[12]

63.5 The court was not impressed with the inability of the "partner" who testified on behalf of Spar, to describe how the plaintiff had tripped even after he had watched the video of the incident several times. Furthermore, the court was surprised by the disappearance of the video recording.

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[9] At [9].
[10] Both (supra) at [9].
[11] Both Supra) at [10] and [12]
[12] Both (supra) at [14]

63.6 On the other hand, the plaintiff impressed the court as an honest and careful witness;[13]

63.7 Mr Louw correctly pointed out that the **Both** incident occurred within a supermarket. The court held that when accidents occur within a supermarket, any obstacle that was on the floor over which a customer may have tripped, is an obstacle which should not have been there. In the matter at hand the plaintiff fell on an exterior paved area.

[64] The plaintiff did not testify in detail about the condition of the paving at the Showgate Centre regarding the parking area and the adjacent walkway except to say that afterwards, and with reference to the photographs shown to her, it is clear that the paving stones are uneven and that the paving stone marked “x3” is raised. She furthermore testified that according to her the paving was not done well (“was nie mooi gelê nie”) and appeared to be in a bad state.

[65] During argument and in his heads of argument Mr Louw often referred to the paving “blocks/stones which were lifted” – meaning more than one paving block or stone being uneven and/or lifted. As a matter of fact, it was pleaded by the plaintiff that the defendant(s) neglected to ensure that the sidewalks, walkways, passageways and entranceways and entrances were in a safe condition for the public to enter the business premises and to repair the uneven paving on the sidewalks, walkways, passageways and entranceways, in particular, directly in front of and providing access to the premises.

[66] Having regard to photo 3, it seems as if the paving stones leading up to the entrance of FLM consists of several uneven sections. To the left of the entrance an obvious hollow portion is visible. Not only the paving in the walkway, but also the tiles on the inside of the premises of FLM presents with dark marks which resembles possible damage or imperfections. These uneven areas and imperfections are even more clearly visible on photo 4. Photo 4 is an enlargement of the floor surface of the area depicted on photo 3 and depicts the paving stones directly at the outside of the entrance to FLM and the first two rows of tiles on the inside of FLM’s premises.

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[13] Both (supra) at [16]

[67] The demarcation between the outside paving area and the tiles on the inside of the premises is not clearly defined by a border or trim and the edge seems uneven. The paving stones on photo 13 are not in a pristine or immaculate condition at all. In fact, several “lifted” paving stones can be detected to the right of the paving stone marked “X3” and a broken paving stone just in front of “X3’ is also visible. It has to be kept in mind that photo 13 seems to be an enlargement of the area. Photo 13 does not, to my mind, depict the visibility of the raised paving when an adult approaches the specific area when walking in a normal upright position. This is observations made from the photograph contained in plaintiff’s photo bundle.

[68] The plaintiff did not present any evidence or expert evidence regarding:

68.1 the nature and extent of the unevenness of the paving;

68.2 the height of the unevenness in general;

68.3 or the height of the unevenness of the lifted or raised paving stone (“X3”) which allegedly caused her to fall;

68.4 the reasonable standard/condition of paving similar to the area or location pertaining to the plaintiff’s complaint.

[69] The evidence of the plaintiff regarding the exact location where she fell and the cause thereof must be considered in light of the following facts:

69.1 The plaintiff’s response to a request by FLM for an admission, that the area where the purported uneven and unsafe paving was located was on a passage, was that the uneven and unsafe paving was on the passage located at the entrance of the property as depicted on photo 3”;

69.2 The plaintiff testified that she took photo 13 with her cell phone and would have shown photo 13, the raised paving stone, to her attorney when she consulted with him;

69.3 A copy of photo 13 was not initially discovered by the plaintiff;

69.4 During cross-examination the plaintiff confirmed that photo 3 does not depict the area where the uneven and unsafe paving was located. She did not fall in close proximity of the area depicted on photo 3;

69.5 In the photo bundle provided by the plaintiff during the trial (exhibit “B”), and on the very same photo 3 a small “X” was appended unto the photograph. The plaintiff could not provide any explanation for this inconsistency;

69.6 The plaintiff elected not to call any witnesses or to explain this material contradiction regarding the exact location where she had fallen in respect of the answer provided during preparation for trial and with reference to photo 3.

[70] Furthermore, FLM presented the evidence of Van Deventer, who conducted health and safety inspections at this particular premises as well as at numerous other branches of FLM. Although Van Deventer was concerned regarding the inside of the premises, she also traversed the outside area and more specifically the passage way leading to the entrance, which includes the area where the plaintiff fell. She did not notice anything that concerned her regarding a hazardous or dangerous situation in respect of the paving.

[71] Verster explained that any maintenance issues had to be reported to the Trust. This fact is also conveyed to the tenants in writing at the bottom of the monthly statements. FLM did not report any damaged or raised paving to the Trust during 2018. No repairs were effected to the paving at Showgate Centre after the incident. Verster opined that the condition of the paving as depicted on photo 3 and 4 is fair.

[72] The mere fact that the plaintiff, on her version, fell as a result of a raised paving stone, does not automatically equate to a finding of danger or that of being unsafe. In **Skejana v Buffalo Metropolitan Municipality**[14] the plaintiff stated that the pavement had been uneven as apparent from the photographs presented during the trial. The court held that from the photographs, the pavement where the plaintiff fell: “… seems to have been far from perfect but not impossible to have used while exercising a reasonable amount of caution. There was nothing to suggest that it was marked by large potholes or broken paving or that the uneven surface was difficult to discern.”[15]

[73] Previously there was no duty upon municipalities to repair and maintain a street or pavement.[16] However in **Cape Town Municipality v Bakkerud,**[17] the Supreme Court of Appeal held as follows:

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[14] 2022 JDR 3723 (ECGEL). at [29].
[15] Skejana (*supra*) at [29] and [30].
[16] Moulang v Port Elizabeth Municipality 1958 (2) SA 518 (A) at 522E-H.
[17] 2000 (3) SA 1049 (SCA).

> "[28] There can be no principle of law that all municipalities have at all times a legal duty to repair or to warn the public whenever and whatever potholes may occur in whatever pavements or streets may be vested in them.
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> [29] It is tempting to construct such a legal duty on the strength of a sense of security engendered by the mere provision of a street or pavement by a municipality but I do not think one can generalise in that regard. It is axiomatic that man-made streets and pavements will not always be in the pristine condition in which they were when first constructed and that it would be well-nigh impossible for even the largest and most well-funded municipalities to keep them all in that state at all times. A reasonable sense of proportion is called for. The public must be taken to realise that and to have a care for its own safety when using the roads and pavements.
>
> [30] It is not necessary, nor would it be possible, to provide a catalogue of the circumstances in which it would be right to impose a legal duty to repair or to warn upon a municipality. Obvious cases would be those in which difficult to see holes develop in a much used street or pavement which is frequently so crowded that the holes are upon one before one has had sufficient opportunity to see and to negotiate them. Another example, admittedly extreme, would be a crevice caused by an earth tremor and spanning a road entirely. The variety of conceivable situations which could arise is infinite.
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> [31] *Per contra*, it would, I think, be going too far to impose a legal duty upon all municipalities to maintain a billiard table-like surface upon all pavements, free of any subsidences or other irregularities which might cause an unwary pedestrian to stumble and possibly fall. It will be for a plaintiff to place before the court in any given case sufficient evidence to enable it to conclude that a legal duty to repair or to warn should be held to have existed. It will also be for a plaintiff to prove that the failure to repair or to warn was blameworthy (attributable to culpa). It is so that some (but not all) of the factors relevant to the first enquiry will also be relevant to the second enquiry (if it be reached), but that does not mean that they must be excluded from the first enquiry. Having to discharge the onus of proving both the existence of the legal duty and blameworthiness in failing to fulfil it will, I think, go a long way to prevent the opening of the floodgates to claims of this type of which municipalities are so fearful." (Underlining added)

[74] I am mindful of the shift in municipality liability cases and that the doctrine of municipal immunity no longer applies. Municipal liability cases should be decided in accordance with the common law principles of delictual liability which includes an anterior finding of wrongfulness based on the legal convictions of the community. In the matter at hand, the condition of paving stones on an exterior passageway in front of a shopping centre is at stake, not the inside, tiled passages of a shopping mall. The paved parking area including the paved walkway leading to the entrance of FLM consists of the same paving bricks. The paving had existed in the same condition, as

it was when the incident involving the plaintiff occurred, for a considerable time prior thereto as well as afterwards. No complaints other than the complaint of the plaintiff had been received regarding the condition of the paving stone(s). The paving on the walkway where the raised paving stone ("X3") was photographed, had not been repaired as a result of the incident.

[75] To my mind there was nothing out of the ordinary regarding the paving stones. The condition of the paving seems fair and reasonable having regard to the fact that it is suitable for an exterior surface covering. No deep crevices or gaping holes are visible. I agree with the plaintiff's contention that the paving appears to be uneven, but it is the degree of unevenness and the question whether it poses a dangerous or hazardous situation that have to be adjudicated upon.

[76] Even if I am wrong in my finding that FLM is not liable having regard to the lease agreement and the use of the walkway to display their merchandise, I am not convinced that the plaintiff placed sufficient evidence before court to enable me to conclude that a legal duty to repair the uneven paving stone ("X3") or paving area or to warn patrons or customers that the area consist of uneven paving can be found to have existed.

[77] In **Prinsloo v Barnyard Theatre and Another**[18] the plaintiff and her daughter attended a show at the Barnyard Theatre in the Menlyn Shopping Centre in Pretoria. After the show they proceeded downstairs using the staircase. After reaching a landing the plaintiff had to turn to her right and descend further by way of five more steps. The first section of the staircase had a handrail while the last five steps did not have a similar handrail. The plaintiff fell and sustained injuries as a result of falling down the last set of five stairs. The plaintiff's claim was that she was injured because the defendant failed to install a handrail along the bottom steps. The court held that the staircase, in particular the last five steps, can be negotiated by any healthy able–bodied person.

[78] During the trial it became unclear whether the cause of the plaintiff's fall was attributed to the absence of a handrail, the poor lightning or the uneven steps or all of these factors. It became evident that the plaintiff assumed or expected a handrail and that she fell because she reached for the non-existent handrail and lost her balance.

[18] (27705/06) [2009] ZAGPPHC 105 (4 September 2009).

The court found that it was not so dark that one could not see the stairs and whether or not there had been a handrail. If the plaintiff had looked for a handrail, she would have seen that there was none. The court held as follows:

> "People negotiate all kinds of stairs and obstacles in everyday life without falling. Sometimes they stumble and fall where there are no obstacles, even in their own homes. It cannot be expected of owners of property to protect the public against their own inattentiveness or possible clumsiness."

[79] The ultimate enquiry is whether FLM and/or the Trust can reasonably be expected to have acted in the circumstances of the particular case. It is to be expected that the paving stones outside a shopping mall and on a walkway from the parking area to the entrance of a shop will not always be in perfect and pristine (or "billiard table-like surface") condition. I agree with the finding by Supreme Court of Appeal in **Cape Town Municipality v Bakkerud,**[19] where it was held that "a reasonable sense of proportion is called for" and that "the public must be taken to realise that and to have a care for its own safety when using the roads and pavements."[20] If the plaintiff kept a proper lookout she would have noticed that the paving is uneven.

[80] The next question is whether it was foreseeable that a patron or customer to the Showgate Centre would assume that the paving leading to the entrance of FLM would be perfectly even and smooth, without any imperfections, and that FLM and/or the Trust should have foreseen the likelihood of a person falling as a result thereof and failed to remedy the situation. Both FLM and the Trust had at all relevant times implemented a system in dealing with repairs and maintenance of the infrastructure which included the paving and walkways. No reports apart from the complaint by the plaintiff had been received pertaining to the condition of the paving. Applying the test for negligence in Kruger v Coetzee, it is clear that the plaintiff has not shown the existence of a dangerous situation in respect of which FLM or the Trust could have foreseen harm and would require to take steps to prevent such harm.

[81] I find it apposite to make a finding pertaining to the demeanour and reliability of the witnesses. During argument it became clear that Mr Louw and Mr Van der Merwe did not agree on the issue whether the plaintiff had seen the disclaimer notice during her

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[19] 2000 (3) SA 1049 (SCA).
[20] At [29].

visit to FLM or not. According to Mr Louw his client did not see the disclaimer notice. Mr Van der Merwe argued that she conceded during cross examination that she had seen the disclaimer notice. To my mind the confusion regarding this issue is mainly due to the way in which the plaintiff responded to the questions regarding this aspect and in general during her testimony.

[82] In chief the plaintiff testified that she did not see the disclaimer notice. However, during cross examination and when the plaintiff was confronted by Mr van der Merwe with the fact that she stepped up onto the walkway where the disclaimer notice was posted against the wall and having regard to her testimony that she looked ahead of her when walking and not at the ground, she must have seen the disclaimer notice right in front of her, she responded that she must have seen it then. (“Ek moes dit seker raakgesien het”.)

[83] My impression of the veracity of the plaintiff’s observations pertaining to the condition of the paving, the exact area where she fell and the question whether she saw the disclaimer notice or not, is that she is vague and unreliable. The plaintiff’s attitude while testifying was that she had never fallen before in her life and she is very steady on her feet therefore the fact that she fell when walking to the entrance of FLM, has to be attributed to the fault of somebody else. She has obviously never considered the fact that her own inattentiveness and her failure to observe where she was walking caused her to fall. In this regard I take cognisance of her response to the statement that FLM and the Trust will contend that she failed to keep a proper lookout to which she replied that it is simply nonsense. On her own version she did not see the ramp and she did not notice the raised paving stone(s) during broad daylight.

[84] The plaintiff did not impress me as a careful and truthful witness. The contradiction and confusion pertaining to the place where the plaintiff fell with reference to the averments in the particulars of claim, the photographs of the entrance to FLM and the reply to the question where exactly the incident occurred, being the entrance to FLM and the testimony in court that by referring to right in front of the entrance actually refers to the whole area in between the entrance and the exit, is a further example of the unreliableness of the plaintiff’s evidence. I do not have any criticism against the demeanour and reliableness of Van Deventer’s and Verster’s evidence.

[85] The plaintiff has not satisfied the elements of the delictual action in that she did not satisfy the requirement of wrongfulness, she did not prove the cause and location of her fall and she did not satisfy the requirement of negligence of either FLM, nor the Trust. The plaintiff was negligent on her own version.

ORDER:

[64] In the result:

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

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VAN RHYN J

On behalf of the Plaintiff:	ADV. M C LOUW
Instructed by:	HILL McHARDY & HERBST INC. BLOEMFONTEIN
On behalf of the First Defendant:	ADV. W A DE BEER
Instructed by:	WESSELS & SMITH INC. BLOEMFONTEIN
On behalf of the Second - Fourth Defendants:	ADV. R VAN DER MERWE
Instructed by:	PHATSHOANE HENNEY INC. BLOEMFONTEIN