IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 13/17950

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED :

.....

DATE

.....

SIGNATURE

In the matter between:

LEIGH GLENYS FERREIRA	First Plaintiff
MARIO DE SOUSA	Second Plaintiff
AND	
PICK 'N PAY RETAILERS (PTY) LTD	Defendant
And	
DOUBLE QUICK CLEANING CC &	Third Party
BERNA VENTER	First Third Party
ADRIANA JELIAZKOVA PETROVA	Second Third Party
RATSHIDI OBAKENG ALBARNUS RAMMUTLA	Third Third Party
KENNEDY JOHN MATSHANA	Fourth Third Party

JUDGMENT

HERTENBERGER AJ:

[1] This is a delictual action instituted by the Plaintiffs against Defendant for damages which they aver resulted from the First Plaintiff having slipped on liquid in the Defendant's store in East Rand Mall, which fall resulted in injury to the Plaintiff, which injury further resulted in a abruption placentae in consequence of which the Plaintiffs' child (Sergio) was delivered by emergency caesarean section at 32 weeks with several deformities. In addition to the aforesaid, the First Plaintiff suffers from Post-Traumatic Stress Disorder and is no longer able to work as a hairstylist. The First and Second Defendant are cited herein as the parents and natural guardians of the minor child.

[2] The Defendant brought an application to join the Third Party to the proceedings. The Third Party was the appointed cleaning contractor in the store at the time of the incident. Further third parties were joined in the matter, but are not relevant for purposes of this judgment. This court is asked to simply make a finding on the merits as to whether any negligence can be attributed to either or both the Defendant and the First Third Party. This is in accordance with an order granted by Maier-Frawley AJ on 17 October 2018 after hearing the application for separation of issues brought be the Plaintiff.

[3] The common cause facts in this matter are briefly as follows: The First Plaintiff who was at the time employed at a hair salon in the East Rand Mall visited the Pick 'n Pay Hyper store in the same mall, where she slipped and injured herself. She was 7 months pregnant at the time. Further, the parties are ad idem that the Pick 'n Pay store had contracted the Third party as a cleaning contractor in the store.

[4] The Defendant and the Third Party raise two defenses to the claim of the Plaintiff. The first defense is based on the disclaimer which was displayed on the entrance door of the Pick 'n Pay store. The second being that the Defendant and/or the Third Party were not negligent.

[5] The First Plaintiff was the only witness in support of her matter. She testified that she worked at a hairdressing salon as a Master Hairstylist and that her place of work was located within the mall, which serves mainly as premises for the Pick 'n Pay Hyper, but is complemented by several smaller stores that are occupied by other businesses. The main entrance to the mall is also the main entrance to the Pick 'n Pay store. As the Pick 'n Pay would open for business later than some of the other stores, the First Plaintiff would utilize an entrance at the back of the salon to enter her place of work.

[6] Clients of the salon and patrons of Pick 'n Pay would however enter via the main mall entrance, which was also the main entrance to the Pick 'n Pay. She was asked whether she had ever seen a disclaimer sign on the glass doors at the Pick 'n Pay's main entrance, to which she responded that she had not as the sign was not visible when the entrance doors were stacked up and she in any event entered the Pick 'n Pay by walking from the salon through the row of tills at the Pick 'n Pay. No one ever prevented her from doing so.

[7] On the day of the incident, the Plaintiff had been busy working at the salon, when she went to Pick 'n Pay to purchase a beverage for a salon client. She walked through the

main door of the salon, across the walkway and entered the Pick 'n Pay near where the baskets were kept and then proceeded to walk to the aisle where the juice was kept taking a detour through the aisle alongside the one she was going to and turning into the "juice aisle". There were two packers in the aisle. She took two orange juices from the shelf in the open fridge and upon turning to leave, she slipped in a split like motion and shouted "the floor is wet". She further tells the court that she had only upon falling noticed that there was an "orange/brown liquid" on the floor. She had seen no cleaners in the aisle. Having gotten up she left the store, pausing to a store manager who was at the fruit display, who looked at her blankly when she told him that there would be trouble if harm had come to the baby. She then went back to the salon. During cross examination, the First Plaintiff explained how she had turned onto her knees and hands to get up. Further, she alleges that her pants and top had been stained by the liquid. The packers laughed at her and did not assist. Upon being asked, the First Plaintiff could not clearly recall whether she had held onto the juice and money or whether she had dropped them and picked them up. The First Plaintiff could not assist in what the source of the liquid on the floor might have been and how long it had been there: she noticed it only when she fell.

[8] The first witness for the defense, Albert Ratsemetse, confirmed that he was employed by Clover as a shelf packer and stationed at the Pick 'n Pay store and that on the day of the incident, he was taking Clover items from his trolley to pack them in the fridge in the aisle in which the incident occurred. He turned to look when he heard a sound to find that the First Plaintiff had fallen. His offer to assist the First Plaintiff was declined, so he reported the incident to the information desk and upon returning to the aisle, the First Plaintiff had left and other persons had gathered around the area. Under cross examination, Mr. Ratsemetse testified that he saw no liquid. He also testified that a cleaner was in the near vicinity and that she would have noticed a spill had there been one. The cleaner in question was one "Thembi", who the court learned had passed away.

[9] Neil Cilliers, the Operations Manager of Pick 'n Pay, next testified on behalf the Defendant. He is in charge of monitoring operations at various stores. In the execution of his duties he visits the shops and ensures that the stores are kept at the standards required by Pick 'n Pay. He explained the day to day running of the stores and the responsibilities of everyone on the store floor, be they merchandisers or cleaning staff employed by other companies or service providers or persons employed directly by Pick 'n Pay. The standards of cleaning as set out in the agreement concluded between the Defendant and the Third Party were put to him and confirmed. Mr. Cilliers told the court that at any given time, there would be 7 cleaners, 5 or 6 managers, the store manager Shaun, as well as the general manager and Eric Khoza along with approximately 150 merchandisers on the shop floor. Each one of these persons was trained and in fact

obliged to report any potential hazard to a cleaner or the information desk, so that same could be promptly dealt with. An independent company, Aspirata, was contracted to regularly assess the stores on various criteria, cleaning being one of them. Aspirata had not raised any concerns and had rated the cleaning of the store at 100% in June 2012.

[10] Mr Eric Khosa testified next. He was the security manager at the store since 1992 and also at the time of the incident. His duties included being in charge of the cleaners and for this purpose he would liaise with an employee of the second Defendant. As part of his duties he would move around the store to check the work carried out and would sign off on it. In addition to the Mr. Khosa's supervision an independent company by the name of "Aspirato" is appointed to do an audit of store procedures once monthly by way of an unannounced visit. He reports that generally the cleaners receive a very good result in these audits. Further, Mr. Knosa could confirm that the disclaimer sign on the store front is now positioned differently to what it was at the time of the incident. Upon questioning by counsel for the Third Party Mr. Khosa acknowledged that the employee per store area ration was approximately 1:1.47square meters, is a particularly good coverage for a large store of this size.

[11] The member of the Third Party, Mr. Jerry Mueller, testified that he has been in the cleaning industry for 23 years and that the Third Party has cleaning contracts at industrial, office and commercial sites and had attended at this site from 2010 to 2014. In his experience the important factors to render a competent cleaning service is to have one cleaner per 1000 square meters of floor space (which included flooring covered by shelving) and that the thorough cleaning happened at by way of cleaning machines used during the night shift. The daytime cleaning involved both maintaining clean areas and responding to any messes on the floors, which included spills. He also indicated that trolleys were strategically placed and that warning signs would be put up to warn people of potential hazards. Once such a sign was placed at the site of a spillage, a janitor trolley would be fetched (these being strategically placed throughout the store) and the spillage would be cleaned. The trolleys were equipped with all that was needed to attend and secure such a hazard. In order to ensure detection of a spillage, employees would roam the floor and be able to summon a cleaner through an intercom. One cleaner would look after five isles and it would take approximately 4 to 10 minutes to go through 5 isles, or to return from the route to a spot that required attention. Perishable goods areas are considered high risk and are thus monitored more closely. During the "high traffic times" (11:00 to 14:00) the two day shifts would overlap and thus there would be twice as many cleaners. When asked where the responsible cleaner on duty at the isle on the day was, the witness replied that the lady had since passed away, but that he recalled that there had never been any complaints about her work performance. Upon cross-examination, the witness did not waver from his evidence in chief as far as he was confident of the system in place and the floor coverage by the cleaners. He conceded that his floor manager did not inform him of the incident now before this court. This fact however does not impact on the procedures that he testified to and the turn-around time of the cleaners.

[12] The second witness for the Third Party was the floor manager placed by the cleaning company at the store on the day of the incident, a Mr. Themkhulu. He confirmed that he was at the shop on the date in question and recalled that he was roaming the shop and was in the clothing department when the incident occurred. He was not in the aisle where the First Plaintiff slipped, but proceeded to the area upon the incident being announced on the intercom. At the scene he found a cleaner by the name of Thembi and a shelf packer, Albert Ratsemetse. The Plaintiff was not there, but the witness was told that she had moved to the customer service area. Upon inspection of the floor, he says he saw nothing out of the ordinary and no trace of anything that had been mopped up. The floor did not appear wet at all. The incident occurred during peak time and there were two overlapping shifts active at the time. Further he estimated from his experience that a spillage would be detected in a space of less than five minutes. Asked why there was not a cleaner in each aisle, he clearly indicated that the store was well covered according to the areas in which spillage was most likely to occur: keeping in mind that there are areas where the likelihood of spillage was much less.

[13] Under cross examination, there was some debate over whether the incident took place at 14:00 or after 14:15. The relevance of this was to illustrate whether there were two cleaners on duty or just one. The witness clarified the dispute by saying that it must have been at 14:00 as the cleaner whose shift ended at 14:00 attended to the spill. Despite questions put by Plaintiff's counsel to imply that due process had not been adhered to, the witness remained confident in his replies and did not waiver from previous evidence given by him. The replies of the witness to Defendant's counsel confirmed the evidence already given.

[14] This court is asked to make a finding on whether the fall of the First Plaintiff was caused by the negligence of the Defendant, alternatively the Third Party, as the cleaning company.

[15] The parties all canvassed the question of the disclaimer displayed by the Defendant on its store. The Defendant and Third Party had relied on this disclaimer to exculpate themselves from liability herein. It was agreed that the store had undergone some changes since the incident and further there was evidence which indicated that there was a fair amount of uncertainty that the disclaimer was visible to the First Plaintiff when entering the store from her employer's premises. The evidence in this regard was thus not sufficient to find that the disclaimer could be relied upon and accordingly this defense cannot be upheld.

[16] The salient question that the court must consider is whether an act or omission by the Defendant and/or the Third Party caused the First Plaintiff to fall or in the alternative whether the Defendant and/or Third Party acted wrongfully or negligently under the circumstances, thus causing the First Plaintiff to fall.

[17] It appears from the evidence, more particularly Bundle F pages 4 and 5 that the incident occurred between 13:00 and 14:20 of the day. Given the fact that both exhibits include 13:00 to 14:00 within the listed timeframe, it is accepted that the incident occurred during or just after the lunch hour. Through evidence it was established that the lunch time period is a high traffic hour and thus there are two shifts on duty at that time. It was also agreed that the First Plaintiff was shod in slip slops on the day. In addition she gave evidence that she only noticed that the floor was wet when she fell. Mr. Ratsemetse who was closest to the scene of the incident did not see any liquid on the floor at the time. It seems that he would have been able to see if the floor was wet or not, because he approached her to pick her up. He also informs the court that a cleaner was nearby at the time.

[18] The alleged incident that brings this matter before this court is one that has been canvassed by our courts on many occasions. In the matter of Gordon v Da Mata 1969 (3) SA 285 at 288 G the court remarked that one would approach a matter with caution when the "only evidence for the plaintiff about how the accident occurred was her own". The evidence in this matter relies only on the report of the First Plaintiff. No other witness was led by the First Plaintiff and none of the Defendant' nor the Third Parties' witnesses observed the fall. Mr. Ratsumetse sat with his back to the First Plaintiff, but as has already been stated did not see any substance on the floor, as alleged by the First Plaintiff.

[19] The test formulated for negligence by Holmes JA in Kruger v Coetzee 1966 (2) SA 428 at 430E – G is as follows:

"For 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 an occurrence;

And

(b) the defendant failed to take such steps.

[20] In the matter of Probst v Pick 'n Pay Retailers (Pty) Ltd 1998 (2) All SA 186 (W) Stegmann J held that:

"The duty on the keeper of the 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."

[21] The aforesaid duty can in my view be extended to include the contractor whom the Defendant appointed in casu to attend to the cleaning of the store, being the Third Party. It is true that certain areas in supermarkets are higher risk areas than others, but this was acknowledged by both the witnesses for the Defendant and Third Party. It seems however quite clear that stores cannot be expected to appoint a cleaner per aisle even in high risk areas thereof. The costs incurred in doing so would be exorbitant. I am of the view that the fact that there were two overlapping shifts on attendance at the approximate time of the incident, that sufficient care was taken by both the Defendant and its contractor the Third Party. If the witness, other than the First Plaintiff, closest to the incident did not notice a spill, it leaves only two possibilities, namely that there was no spill or that a spill occurred either mere seconds before or during the time of the fall of the Plaintiff. It would have been nearly impossible under these circumstances to put up warning signs and to clean the area so as to prevent the fall.

[22] The court has considered both the judgment in matter of Lindsay v Checkers Supermarket 2008 (4) SA 643 (N) and the subsequent appeal in Checkers Supermarket v Lindsay 2009 (4) SA 459 (A) where the court in both instances found that the store had been negligent and did not have a proper system in place to deal with the spillages. In this matter both the Defendant and the Third Party could satisfy the court that all involved had been trained to, and in fact applied a very effective system of dealing with spills in the store and that they cannot be found to be negligent under the circumstances.

[23] Accordingly I find that the Plaintiff's claim on the merits does not succeed.

[24] In the result the following order is made:

(1) The Plaintiff's claim is dismissed;

(2) Plaintiff is ordered to pay costs of suit on the scale between party and party.

R HERTENBERGER AJ

ACTING JUDGE OF THE

GAUTENG LOCAL DIVISION

JOHANNESBURG

APPEARANCES:

COUNSEL FOR PLAINTIFF:	ADV N ALLI
PLAINTIFF'S ATTORNEYS:	MUNRO FLOWERS AND VERMAAK
COUNSEL FOR DEFENDANT:	ADV M PILLAY

DEFENDANT'S ATTORNEYS:	HARVEY NOSSEL
COUNSEL FOR THE THIRD PARTY:	ADV AP DEN HARTOG
THIRD PARTIES' ATTORNEYS:	NELSON BORMAN & PARTNERS INC.
DATE OF HEARING:	21-23 NOVEMBER 2018
DATE OF JUDGMENT	12 APRIL 2019