THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE

Case No: 211/13

In the matter between:

AVONMORE SUPERMARKET CC **Appellant**

and

CHRISTINA PETRONELLA VENTER **Respondent**

Neutral citation: *Avonmore Supermarket CC* v *Venter* (211/13) [2014] ZASCA 42 (31 March 2014)

Coram: Ponnan, Mhlantla, Petse and Willis JJA et Van Zyl AJA

Heard: 6 March 2014

Delivered: 31 March 2014

Summary: Delict – negligence – shopper slipping and falling and sustaining injuries – claim for damages against owner of the supermarket.

ORDER

On appeal from: KwaZulu-Natal High Court, Durban (D. Pillay J) sitting as court of first instance):

1 The appeal is dismissed with costs.

2 Paragraph 1 of the order of the high court of 7 December 2012 is amended to read:

'It is declared that the defendant is liable for such damages as might be agreed upon or proved in consequence of the event that is the subject of this claim.'

JUDGMENT

Mhlantla JA (Ponnan, Petse, Willis JJA and Van Zyl AJA concurring):

[1] A lunchtime visit to a supermarket ended badly for Ms Christina Venter (the respondent). On Friday 30 June 2006, the respondent and her colleague Ms Karen Loumeau were shopping at a supermarket owned by Avonmore Supermarket CC (the appellant) when she slipped and fell on a damp floor. As a result of the fall she sustained bodily injuries and in consequence instituted a delictual action for damages against the appellant in the KwaZulu-Natal High Court, Durban.

[2] In her particulars of claim the respondent alleged that the appellant was negligent in that it failed to supervise the cleaning of the supermarket floor adequately; it failed to ensure that adequate steps were taken to warn customers, and in particular the respondent, of the hazard created by the wet floor; and it failed to ensure that proper systems were in place when cleaning the floor.

[3] In the alternative, the respondent alleged that the incident occurred as a result of the negligence of one or more of the employees of the appellant acting in the course and scope of their employment as such who were negligent in the following respects:

(a) they failed to ensure that the aisle was free of water and/or slippery fluids;

(b) they failed to take adequate steps to dry the floor surface in the aisle;

(c) they allowed water and/or slippery fluids to remain on the floor in the aisle in such a fashion and at such a place that it constituted a hazard to members of the public and to the respondent in particular; and

(d) they failed to warn members of the public and particularly the respondent adequately or at all, of the danger created by the wet and slippery floor.

[4] The appellant in its plea denied any negligence either on its part or on the part of its employees. It further pleaded that the nature of its business required its floors to be cleaned frequently and it had as a result employed at arm's length the services of an independent firm named DBU Cleaning Services CC (DBU) to clean the store, and DBU in turn employed persons to do the cleaning. The appellant pleaded that it:

(a) at all material times maintained reasonable systems for the detection, identification and cleaning of spillages at the store; and

(b) at all material times, implemented and maintained the proper execution of reasonable and safe systems for the cleaning of floors, including without limitation the erection of visible warning signage.

Lastly, the appellant pleaded that the independent contractor was liable in the event the cleaners were found to have been negligent.

[5] The matter proceeded to trial in the high court before D Pillay J. At the commencement of the proceedings, the learned judge ordered, at the request of the parties, in terms of Rule 33(4) of the Uniform Rules of Court, that the issue of liability be determined separately from the question of damages. The parties thereafter adduced evidence. Ms Venter and Ms Loumeau testified on behalf of the respondent, whilst Mr James Slater testified for the appellant.

[6] At the conclusion of the trial, the court below concluded that the sole cause of the respondent's fall was the damp floor and that the appellant had failed to give adequate notice to its customers warning them of the potential danger. It found that the appellant was liable as it exercised full control over the cleaners and there was no acceptable evidence to suggest that it had indeed contracted with DBU. The court upheld the respondent's claim and issued an order that the appellant was liable for the damages suffered by the respondent. It held the appellant liable for the costs of that hearing and postponed the issue of quantum sine die. The appeal to this court against that order is with the leave of the court below.

[7] The court below, when granting leave to appeal, invited us to consider the matter in the light of the Consumer Protection Act 68 of 2008. At the commencement of the appeal, both parties submitted, correctly in my view, that this Act was not applicable to the matter at hand. Neither party had raised the applicability of the Act in the pleadings or argument. Nothing more needs to be said about this aspect, save to observe that it appears to have prompted the grant of leave to appeal to this court where the matter may otherwise not have been deserving of the attention of this court.

[8] The first contention advanced by the appellant before this court was that it was absolved from liability by virtue of the contract which it asserted was in place between it and DBU. Generally a principal is not liable for the wrongs of an independent contractor or its employees except where the principal was at fault.[1] The appellant relied on this principle. However, in order to succeed, the appellant had to establish the existence of a valid contract between it and DBU. The appellant in its plea stated that it at arm's length had contracted DBU to provide cleaning services. It did not specify the terms of the contract, nor did it annex the contract. It simply, in reply to a query by the respondent, produced a copy of a contract in terms of Rule 37(4). Before us, counsel for the appellant relied on this document and the evidence of Mr Slater, the manager of the supermarket, that DBU had been engaged by the appellant to clean the store and was responsible for the employment of the cleaners. He submitted that the contract was valid and that DBU would be liable in the event the cleaners were found to be negligent.

[1] *Chartaprops 16 (Pty) Ltd & another v Silberman* 2009 (1) SA 265 (SCA) para 28.

[9] This argument is without merit. No evidence was adduced at all to prove the contract. It was simply placed before the high court as part of a bundle of documents. An analysis of the contract reveals that it was concluded in January 2001 for a period of 12 months. It had expired four years before the incident. It is incomplete as it does not define the scope of the work. There is no reference to the contract fee, premises etc. It transpired during the course of the evidence of Mr Slater that he had no personal knowledge of the contract as he was employed by the appellant after the contract had been concluded. It follows that the appellant has failed to establish the existence of the contract between it and DBU and that defence does not avail it.

[10] The sole remaining issue therefore is whether the appellant was negligent. The ordinary test for establishing the existence or otherwise of negligence was articulated by Holmes JA in *Kruger* v *Coetzee*[2] in the following terms:

'For the purposes of liability *culpa* arises if −

(a) a *diligens paterfamilias* in the position of the defendant −

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

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

(b) the defendant failed to take such steps.

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

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

[11] Turning to the facts of this case, the essence of the respondent's evidence was that she and her colleague Ms Loumeau had been at the supermarket and were walking together from the butchery section. She was about two metres into the aisle when she slipped on the floor and fell. She saw a sign indicating that the floor was wet but it was on the far side of the aisle. There was a cleaner in close proximity to that sign. The floor was wet and the respondent surmised that the floor must have been wet on account of the cleaner in the vicinity.

[12] Ms Loumeau's account of what happened corroborated the respondent's testimony in material respects. She was the first person to attend to the respondent as they were together when she fell. Mr Slater arrived later.

[13] The evidence adduced on behalf of the appellant was to the effect that the appellant had conducted a routine cleaning operation. Mr Slater testified that a male cleaner, Alson, who had since died, had recently mopped the area where the respondent had fallen. He stated that he was at the butchery section when he saw the respondent. She was alone and when she rounded the corner entering the aisle, she slipped and fell. Importantly, Mr Slater testified that when he went to the respondent's assistance, the floor was damp.

[14] The following facts are common cause or at least not in dispute:

(a) the respondent was at the supermarket;

(b) the appellant had undertaken a routine cleaning operation of the store.

(c) the cleaner, Alson mopped the floor and moved away from the area whilst it was damp or wet;

(d) the mopping of the supermarket floor created a potential danger to shoppers;

(e) the respondent slipped on the damp floor and fell;

(f) A warning sign indicating that the floor was wet or slippery was beyond the point where she fell; and

(g) the cause of her slipping and falling was the damp floor.

[15] In so far as the enquiry under (a) and (b) of the test is concerned, there can be no doubt that the reasonable possibility of a person slipping and falling as a result of a damp floor was foreseeable. That was conceded by Mr Slater in his evidence. The appellant was accordingly obliged to take such precautions as were reasonable to guard against that eventuality. What these steps would have been depends on an examination of all the relevant circumstances. In *Ngubane* v *South African Transport Services*,[3] the court said:

'Once it is established that a reasonable man would have foreseen the possibility of harm, the question arises whether he would have taken measures to prevent the occurrence of the foreseeable harm. The answer depends on the circumstances of the case. There are, however, four basic considerations in each case which influence the reaction of the reasonable man in a situation posing a foreseeable risk of harm to others: *(a)* the degree or extent of the risk created by the actor's conduct; *(b)* the gravity of the possible consequences if the risk of harm materialises; *(c)* the utility of the actor's conduct; and *(d)* the burden of eliminating the risk of harm.'

[16] It was accepted on behalf of the appellant that as the owner of a store, it had a legal duty to ensure that its premises were safe for those who use them.[4] The issue therefore is whether the steps taken by the appellant were reasonable under the circumstances. Counsel for the appellant submitted that it had taken reasonable steps to guard against the risk of harm that the cleaning of its store posed to customers. In this regard reliance was placed on the testimony of Mr Slater who outlined the measures taken by the appellant to ensure that its store was clean and safe during trading hours.

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[3] *Ngubane* v *South African Transport Services* 1991 (1) SA 756 (A) at 776G-I.
[4] *Probst* v *Pick 'n Pay Retailers (Pty) Ltd* [1998] 2 All SA 186 (W) at 200. See too *Brauns* v *Shoprite Checkers (Pty) Ltd* 2004 (6) SA 211 (E) and *Swinburne* v *Newbee Investments* (Pty) Ltd 2010 (5) SA 296 (KZD) para 13.

[17] In this regard Mr Slater testified that the appellant had its own rules and regulations about what had to be done, things to be cleaned and processes to be followed. The managers on the floor would ensure that any mistakes by any cleaner were corrected. Any spillage on the floor would be brought to the attention of the manager whereafter the area would be sealed off and cleaned. He stated that the two cleaners would clean in the morning before the customers came in. During the day, they would do general maintenance and attend to any spills. He, as manager, would inspect the store throughout the day to check that it was clean. The cleaners were provided with specialised cleaning equipment. They were obliged to put up the signs indicating that the floor was wet or slippery in the vicinity of the area they were working in. They had to mop and wipe the floor and ensure that the area was not saturated with water. He stated that it would not be dangerous not to have displayed the sign, but would be negligent.

[18] In *Probst* v *Pick 'n Pay*,[5] the plaintiff had slipped on some cooking oil which had spilled on the floor. The court held that the defendant did not have a proper system to cover the shop floor at reasonable intervals and this had led to a situation in which it could take hours to discover a spillage. The defendant was found to be negligent and liable for the plaintiff's damages. In *Brauns* v *Shoprite Checkers*,[6] the plaintiff whilst shopping at the defendant's shop fell on a slippery surface on the floor. It transpired that there was a quantity of water on the floor at the place where she fell. It was established that the water had been there for half an hour or longer before the plaintiff fell, and that the defendant had been forewarned of the potential hazard to customers but had taken no steps to warn the customers of the water on the floor or to have the water cleaned up.

[5] Above at 201.
[6] Above at 219C-220D.

The defendant was found to have been negligent and liable for the damages of the plaintiff.

[19] Whilst the cases like *Probst* and *Brauns* are instructive, it is important to recognise that they were concerned with the danger created by a spillage that went undetected and the focus was on the adequacy of the system in place to detect and deal with spillages. In this case unlike in *Probst* and *Brauns* a voluntary task, namely a routine cleaning, was undertaken at the instance of the appellant. Alson mopped the floor. Notwithstanding the measures outlined by Slater, Alson did not ensure that the area was dry when he moved on. Nor did he place a warning sign for the benefit of the shoppers sufficiently close to the area concerned to warn them that it was slippery or wet.

[20] I accept that there is a need to mop the floors of a store to ensure that it is clean. However, the manner of execution of that task is crucial. It is clear that the appellant's conduct caused the danger. The routine cleaning operation was done during a busy period. The cleaner left behind him a damp floor. That should not have happened. The cleaning operation should have been conducted in such a manner that the cleaner ought to have worked on a small area and ensured that the area was dry before moving on. In my view that would not have placed an onerous burden on him or his supervisor. This routine cleaning operation created a potential hazard to customers and in particular the respondent. The appellant had a duty to regulate its conduct in order to minimise or eliminate the risk of harm. I accordingly conclude that negligence has been established.

[21] It follows that the respondent's fall and subsequent injury were caused solely by the negligence of the appellant and its employees. The appeal therefore fails.

[22] In the result, the following order is made:

1 The appeal is dismissed with costs.

2 Paragraph 1 of the order of the high court of 7 December 2012 is amended to read:

'It is declared that the defendant is liable for such damages as might be agreed upon or proved in consequence of the event that is the subject of this claim.'

N.Z MHLANTLA
JUDGE OF APPEAL

APPEARANCES:

For Appellant: M Pillemer SC (with him S Hoar)
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