

SOUTH AFRICA / JUDGMENT

Barnard v Peregrine Plaza (Pty) Ltd (14475/20) [2025] ZAWCHC 48 (18 February 2025) [2025] ZAWCHC 48

COURT

Western Cape High Court, Cape Town

BEFORE

A Montzinger

CASE / FILE NUMBER

14475/20

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FLYNOTES:

PERSONAL INJURY – Slip and trip – Wet walkway – Deck was wet and slippery due to morning dew – Foreseeable hazard – Defendant's failure to inspect, dry, or warn patrons of slippery surface constituted negligence – Owed a duty of care to patrons – Sudden manoeuvre to avoid unexpected obstacle would not likely have led to fall had surface not been wet – No contributory negligence on plaintiff's part – Defendant's omission caused plaintiff's fall – Defendant 100% liable for damages.

IN THE HIGH COURT OF
SOUTH AFRICA
WESTERN CAPE DIVISION,
CAPE TOWN
Case number: 14475/20

In the action between:

AMANDA BARNARD
Plaintiff
and
PEREGRINE PLAZA
(PTY) LTD
Defendant

Before: The Hon. Mr Acting Justice Montzinger

Hearing: 13 – 15 August 2024; 18 September 2024
Judgment delivered
electronically: 18 February 2025

JUDGMENT

(Delivered by email to the parties' legal representatives and by release to SAFLII)

Montzinger AJ

Summary Introduction

1. The plaintiff, a 72-year-old pensioner, seeks to hold the defendant liable for damages after she slipped and fell on a wet and slippery wooden walkway at the defendant's business premises known as the 'Peregrine farm stall' or 'Peregrine'.
2. The defendant operates the Peregrine farm stall as a popular open-air retail and dining operation, combining elements of a farm stall with a broader shopping experience. The farm stall is located just outside the town of Grabouw. The premises hosts various shops housed in pop-up containers, with wooden decking connecting the retail spaces. The operation attracts thousands of patrons monthly, offering a range of goods, including fresh produce, artisanal foods, and other retail products, alongside dining/eatery options. This unique layout of blending commercial and recreational facilities, forms the context within which the incident involving the plaintiff happened which resulted in her instituting this action.
3. The plaintiff's pleaded case is that on 27 July 2019[1], at approximately 11h00, she visited Peregrine farm stall and walked between the shops. She turned right near shop 4, came upon a stack of crates protruding from the front of the container, and had to swerve to avoid them. As she did so, her feet slipped on what she describes as a wet, dirty, and slippery wooden deck. She fell heavily onto her right side and sustained a compound fracture of her femur and other injuries. The plaintiff further pleaded, in her particulars of claim, that the defendant was negligent by allowing the deck to remain wet and slippery without adequate warning or attempts to prevent the incident from occurring.
4. The defendant in its plea admitted that it owed members of the public visiting its premises a duty of care, but it denied negligence. It also pleaded that it had a reasonable system in place to keep the premises safe; that no undue wetness or dirt existed on the deck on the day in question and that warning signs are deployed whenever conditions warrant it. Also, it was pleaded, that the plaintiff herself is to blame for the fall in that she failed to keep a proper lookout, wore unsuitable footwear, and moved suddenly without paying adequate attention. In the alternative, the defendant pleaded contributory negligence on the plaintiff's part and sought an apportionment of damages award should the court find for the plaintiff.

5. The parties have agreed to separate the issue of the merits and quantum. Only evidence in respect of the merits were presented and I am tasked to decide that issue only.
6. The court heard evidence from the plaintiff; Mr Barnard (the plaintiff's husband); and Mr Burls (the defendant's managing director). Various exhibits in the form of trial bundles and photographs were accepted during the course of the trial.

Summary of the evidence

7. I have carefully reflected on the testimony of the witnesses (for the plaintiff and defendant). I observed that each provided coherent and consistent accounts of their testimonies, and I could identify no material contradictions or improbabilities that would cast doubt on their credibility.
8. In the paragraphs that follow, I set out a concise overview of the evidence that each witness contributed to the matter.

Plaintiff's evidence

9. At the start of the plaintiff's evidence I was provided with a document that contained a site plan of the Peregrine farm stall. From this plan, the premises of the farm stall appear to be laid out in a rectangular fashion, with a row of shops (Shop 1, Shop 2, and so forth) arranged around a central courtyard or open-air area. Parking and vehicle access lie on the western side (towards the N2 and Somerset West), while a bus parking area is indicated to the north (towards Bot River). Shop 3 and Shop 4, which are in the form of container units, sit adjacent to each other on the northern edge of the main wooden walkway with an "Open Air Shop" nearby, also fronting onto the wooden deck. A larger "Restaurant/Shop" building

occupies the southern portion of the plan, with a separate toilet block behind it to the east. The walkway in question runs between and in front of these shops, creating a thoroughfare where goods are displayed, and customers move between the various outlets. This open-air deck, therefore, serve as a transitional space that shoppers must traverse to have access to different parts of the farm stall. It is this open-air deck walkway that is central to the incident at issue.

10. The plaintiff testified that 27 July 2019 was a typical winter's morning in the Grabouw area. After they arrived at the farm stall she walked around and moved between the various outlets. She was walking "very slowly" as she browsed the goods displayed in an open area between Shops 3 and 4. Near Shop 4, she noticed a stack of crates only once she had turned the corner leaving the open space between the two shops. Her intention was to continue walking on the wooden where the entrance to Shop 4 was. She testified that the crates were protruding from the edge of Shop 4's front. Startled, she sidestepped to her left to avoid them; in so doing, her feet slipped out from under her.
11. She fell onto her right side and immediately felt intense pain in her leg. She also noticed moisture on the deck when she put her hand on the planks. She described the surface as "very slippery" and "dirty." Mr Barnard was summoned by an onlooker and arrived to assist

the plaintiff who was lying down on the deck. At this point Mr Barnard touched the deck and remarked that it felt damp with dew and that he could feel dust or grime on his hand. An employee or manager, later identified as Mr Hilton Fagri, also arrived. He provided the plaintiff with a blanket, and asked Mr Barnard to help keep bystanders away “so they wouldn’t slip and fall” onto the plaintiff.

12. The plaintiff’s husband took photographs of the scene to document the conditions. She testified further that the shininess on the decking visible in those photos arose from moisture that had collected in the shaded spot where the crates in Shop 4 were and where she fell. The plaintiff was taken from the scene by an ambulance. On the Monday following the incident, one of the defendant’s owners or directors, Ms Muriel Burls, phoned Mr Barnard to inquire about the plaintiff.

Mr Barnard’s Evidence

13. Mr Barnard corroborated his wife’s version of events. He testified that, when he bent down to feel the deck near where the plaintiff had fallen, he found it “reasonably wet from dew” and grimy; his hand showed visible dust. The deck felt “very slippery,” in his words in Afrikaans, “seepglad.”
14. He also described how Mr Fagri expressed concern that the same slippery condition might cause other patrons to slip, prompting them to block off the immediate area around the plaintiff.

Mr Burls’s Evidence

15. Mr Burls, the defendant’s managing director, testified that the deck in front of Shop 4 was constructed of treated pine upon the advice of an architect who knew the premises well. He explained that the defendant employed a professional cleaning company that cleaned regularly on weekdays and performed deeper cleans with sugar soap and high-pressure hoses on an as-needed basis.
16. He acknowledged the use of “wet floor” cones or signage whenever employees or tenants reported a need, for instance, after a lot of rain. He suggested that the “shine” on the photos could be due to the sealant rather than moisture, emphasising that no other patrons had slipped there on that day or any other day, despite some 66 000 customers visiting the premises that month.
17. Although he was aware the plaintiff had pleaded that the walkway was “wet” and “slippery,” he insisted that the real cause of the fall was likely the plaintiff’s failure to keep a proper lookout and her sudden movement upon seeing the crates.

Legal requirements to establish a delict

18. To establish delictual liability, a plaintiff must prove the following five elements[2] on a balance of probabilities:

18.1 Conduct: This can be an act (commission) or a failure to act (omission). An omission can occur when there is a legal duty to prevent harm, as in this case where the defendant is the private owner of a property and has control over it[3].

18.2 Wrongfulness: This is determined by legal and public policy, focusing on the duty to avoid causing harm and the reasonableness of imposing liability[4]. A negligent omission is wrongful only if the law recognises a legal duty to prevent the harm[5]. Factors that a court may consider include foreseeability and extent of harm, risk, constitutional obligations, statutory duties,

interests of the defendant and community, control over the situation, preventative measures, cost proportionality, and other remedies[6].

18.3 Fault (Negligence): This involves a threefold enquiry[7]:

- (i) was the harm reasonably foreseeable? (ii) would a reasonable person (diligens paterfamilias) have taken steps to prevent the harm?; (iii) did the diligens paterfamilias fail to take those steps? The negligent conduct must also be recognized by law as wrongful[8].

18.4 Causation: This involves factual and legal causation: (i) factual causation uses the "but-for" test: would the harm have occurred "but for" the defendant's omission?; while (ii) legal causation considers whether the negligence is closely enough linked to the harm[9].

18.5 Harm/Damages: The plaintiff must prove personal injuries and related losses, such as medical expenses, loss of earning capacity, or pain and suffering.

- 19. A court can address these elements in any order and may start with an element or elements that can be more conveniently determined. However, all elements must be satisfied for the plaintiff to succeed. If a single element is not established, the claim fails.
- 20. In respect of slip-and-fall cases, South African law recognises that a landowner or shopkeeper owes a duty of care to patrons to ensure the premises are reasonably safe, but not to guarantee absolute safety. As per *Probst v Pick 'n Pay*[10], a shopkeeper must have a reasonable system in place to identify and remove hazards, bearing in mind that patrons typically focus on merchandise, not the floor[11]. In *Cenprop*[12] the Supreme Court of Appeal held that slippery floors from weather conditions (such as rain or the trafficking-in of water) are a foreseeable hazard. A shopkeeper must thus take active and reasonable steps, through cleaning, inspection, or warning signs, to mitigate the danger.

Competing contentions on the evidence

- 21. Ms Du Toit appeared for the plaintiff and contended that the defendant knew or ought to have known that an open-air deck in a shaded area could remain damp with winter morning dew. By failing to inspect and dry the walkway or at least place "wet floor" signage, the defendant was negligent. It was also argued that the plaintiff was entitled to walk at a slow pace, looking at the goods on display, and not be constantly surveying the walkway underfoot. That the suggestion that the plaintiff's footwear was inappropriate was denied under cross examination. Lastly, it was argued that the defendant's failure to call Mr Fagri,

who was available to testify virtually, as he now resides overseas, warrants an adverse inference, since his evidence would likely have confirmed the slippery state of the deck and the plaintiff's fall.

22. Ms Oosthuizen appeared for the defendant. She argued that the evidence did not establish that the defendant was negligent. It was contended that on the probabilities the plaintiff must have simply lost her balance when confronted with the crates, or that she tripped, rather than slipped on the wet surface. I was reminded to have regard to the fact that there were no other incidents that day and of the defendant's general cleaning system when the deck was wet. It was further argued that the plaintiff admitted being surprised by the crates, an admission which, the defendant contended, indicates she was not looking where she was going.

Evaluation

23. On the evidence, I accept that the deck was wet from dew, at least in patches, and that it was sufficiently slippery to cause or materially contribute to the plaintiff's fall. Both the plaintiff and Mr Barnard testified credibly that they felt moisture and found the deck "reasonably wet" and "seepglad." Their descriptions of the events of the day align with a typical winter morning scenario. The photographs were said to show "shiny"

sections of plank and that these "shiny" sections represent the dew the plaintiff and Mr Barnard was referring to.

Mr Burls's suggestion that the shine might be the sealant cannot be completely discounted, but he was not personally present at the scene and had no direct observation of the status of the deck that morning.

24. Moreover, the plaintiff testified that the crates only became apparent once she rounded the corner of Shop 4, she then "swivelled" and suddenly slipped. The uncontroverted evidence that Mr Fagri then asked Mr Barnard to keep bystanders away "so they do not also slip" strongly supports the plaintiff's version that the walkway was indeed slippery and caused her fall.
25. In this matter, there is no dispute, and the evidence confirm this, that the defendant "acted" in the sense of operating the farm stall and furnishing the public with access thereto. The evidence was also that the incident involving the plaintiff did happen on the day in question. The evidence also supports a conclusion that the defendant's conduct, for purposes of assessing delictual liability in this case, lies in its alleged omission in that it failed to keep the wooden decking reasonably free of dangers and to warn patrons of a potentially slippery surface. I am thus satisfied that this element of a delict has been established.
26. Since the defendant admitted that it owed the plaintiff a legal duty by nature of the type of business it operates by inviting members from the public to visit its premises, this element does not have to be ventilated in much detail.

27. I am in any event satisfied that there is a legal duty on a shopkeeper, like the defendant, to keep the wooden decking reasonably safe for the public that use it during trading hours, bearing in mind that shoppers will spend much of their time with their attention on goods and merchandise being displayed and not on the floor to ensure that every step that they took was safe. In this instance certainly the legal convictions of the community would require reasonable steps to be taken by the defendant to guard or warn against reasonably foreseeable dangers.
28. In the present circumstances, an open-air deck in winter where morning dew persists, it was reasonably foreseeable that wet planks could pose a slipping hazard. By failing to address or warn against this situation, I find that the defendant's omission, as established by the evidence, was indeed wrongful.
29. In light of the evidence, it is uncontroverted that winter dew frequently collects on the wooden deck, creating a risk of slipperiness. Although the defendant testified that it had a cleaning system in place and deployed "wet floor" cones, when necessary, the plaintiff led evidence that no such measures were taken on the morning of her fall. The presence of crates along the walkway further increased the likelihood that a customer might need to sidestep or make a quick turn, elevating the risk of a slip on a damp surface. Assessing these factual details as a whole, I find that the defendant, in failing to perform an inspection or set out warning signs that day, did not meet the standard of a reasonable person in the position of farm stall owner inviting members of the public to visit its premises.
30. As in *Cenprop*, I find that the presence of water on walking surfaces is eminently foreseeable. Even if not caused by direct rainfall, morning dew in winter is a common phenomenon. The defendant is well aware (or should be aware) of conditions on its premises during. In these circumstances, failing to anticipate or inspect for dew where the deck is covered in shade and the walkway smooth. Particularly where goods are displayed outdoors and customers are invited to look at those goods, constitutes a foreseeable risk. A reasonable person in the defendant's position would take steps to mitigate that risk, such as quickly mopping, drying, or at least warning customers of the slippery surface. While the evidence of Mr Burls was that there was mopping after the incident it does not assist the defendant in this case. It had to be done before the incident, when it was obvious that dew was present.
31. Moreover, the crates placed near the front of Shop4 introduced an additional hazard, forcing the plaintiff to have to step to the side or swerve. This situation in combination with a slippery floor, created a clear risk of a slip-and-fall and was negligent.
32. Finally, the requirement of causation demands that the defendant's omission be linked sufficiently closely to the plaintiff's fall. Factual causation asks whether the plaintiff would have slipped if the walkway had been kept dry or if clear warnings had been posted. The plaintiff's evidence is that she lost her footing when she swerved around the crates,

specifically because the deck was damp and felt slippery. Her husband corroborated seeing moisture and dust on his hand after touching the planks. Furthermore, Mr Fagri's comments, though indirectly relayed, suggested that there was a real hazard underfoot. Had the defendant taken reasonable precautions, it is more likely than not that the plaintiff could have avoided the slippery spot or been alerted to proceed with greater caution. On the probabilities, therefore, the defendant's omission caused, or materially contributed to, the plaintiff's slip and fall.

33. On balance, I find that the plaintiff's fall was caused by her feet slipping on a wet and slipper spot on the deck as she attempted to sidestepped the crates in front of Shop 4. There is no persuasive evidence that she simply "tripped" over her own feet. The immediate, unchallenged observations by both the plaintiff and Mr Barnard regarding moisture and slipperiness, and the reaction from Mr Fagri, bolster the plaintiff's case on causation.

Failure to Call Mr Fagri

34. The defendant did not call Mr Fagri, who was its weekend manager and actually on the scene that day. Despite confirming that he was contactable abroad, the defendant refused to provide his contact details to the plaintiff when it was requested. Our law is clear that where a party declines to call a material witness who is available and able to testify, an adverse inference may be drawn that the witness's testimony would have been unfavourable to the party who could call the witness[13]. Mr Barnard's evidence that Mr Fagri expressed concern about others slipping is directly relevant to the condition of the deck. The defendant's failure to contest what Mr Fagri said to Mr Barnard leaves his version of what was said to him uncontested. I accordingly draw the inference that Mr Fagri's testimony would indeed have corroborated the plaintiff's case on the wetness and slippery status of the walkway, and the plaintiff's fall.

Apportionment or Contributory Negligence

35. The defendant also argued that the plaintiff contributed to her own fall by failing to keep a proper lookout and wearing smooth-soled shoes. However, the evidence was clear that the plaintiff walked slowly and was entitled, in law[14], to pay greater attention to the displayed goods than to her every footstep. Customers do not proceed with their "eyes glued to the ground"[15]. The crates were placed in such a way that they came into view suddenly, triggering her swerve.
36. Having regard to the evidence the plaintiff's situation is similar to what the court had to decide in Cenprop[16]. Therefore, the evidence of the plaintiff that on the morning of the incident the deck she slipped on was wet as a consequence of the dew remained uncontroverted. Her further evidence that she proceeded slowly along the wooden deck but slipped and fell due to the crate and the wet wooden slippery deck which posed a danger to her is unimpeachable. Under the circumstances, there is no basis I can find the plaintiff in any way negligent.

37. In respect of her footwear. Nothing in the evidence suggests that the plaintiff's footwear was particularly improper or that a more "robust" sole would have averted the slip. Had the surface not been damp and grimy, the sudden manoeuvre to avoid an unexpected obstacle would not likely have led to such a fall. I accordingly do not find any contributory negligence on the plaintiff's part.

Costs

38. The plaintiff specifically seeks cost for the postponement of the trial on 14 May 2024 regardless of the outcome of the matter. Since I am finding for the plaintiff the plaintiff would in any event be entitled to her costs. However, for the avoidance of doubt I will briefly state my reasons why the defendant should in any event be liable for the wasted costs occasioned by the postponement on 14 May 2024.
39. At the commencement of trial on 14 May 2024, the defendant objected that it was not prepared to meet a case of a "wet and slippery floor," prompting a postponement so that the plaintiff could formally amend her particulars of claim. However, it is clear from the letter of demand, the inspection with the defendant's insurer, Dr Olivier's medical report attached to the summons, requests for trial particulars, and the issues raised during the pre-trial, that the defendant had long been alerted to the plaintiff's version involving the wetness and slipperiness of the walkway.
40. The conclusion is inescapable that the defendant conduct occasioned the postponement. It was, or should have been, fully aware of the alleged "wet walkway" issue from multiple sources in the record and had ample opportunity to resolve any perceived uncertainty at an earlier stage. The defendant should therefore bear the wasted costs occasioned by that postponement.

Conclusion

41. Having regard to all the evidence and the applicable legal principles, I find that the defendant's omission in failing to take reasonable steps to detect or dry the dew-laden walkway, or to warn the plaintiff of the slippery surface, was negligent and caused the plaintiff's fall. No apportionment is warranted.
42. In the result, the following order is made:
- 42.1 The plaintiff's claim on the merit succeeds and the defendant is liable for 100% of the damages which the plaintiff may prove to have arisen from her fall on 27 July 2019.
- 42.2 The defendant shall pay the plaintiff's costs of suit, including counsel's fees on scale B.
- 42.3 The defendant shall bear the wasted costs occasioned by the postponement on 14 May 2024, including counsel's fees on scale B.

A MONTZINGER

Acting Judge of the High Court

Appearances:

Plaintiff's counsel:

Ms. Du Toit

Plaintiff's attorney:

Lombard & Kriek Inc.

Defendant's counsel:

Ms Ooshuizen

Defendant's attorney:

Adams Attorneys

[1] She was 69 at the time

[2] MTO Forestry (Pty) Ltd v Swart NO 2017

(5) SA 76 (SCA) par [12].

[3] Minister of Forestry v Quathlamba (Pty) Ltd 1973

(3) SA 69 (A)

[4] Loureiro & others v Imvula Quality Protection (Pty) Ltd [2014] ZACC 4; 2014

(3) SA 394 (CC) para 53

[5] Minister of Safety and Security v Van Duivenboden 2002

(6) SA 431 (SCA) para 12

[6] Kruger v MEC, Transport & Public Works for the Western Cape and Another (10067/2011)
[2015] ZAWCHC 158 (29 October 2015) ("Kruger v MEC") par 43

[7] Butise v City of Johannesburg and Others 2011

(6) SA 196 (GSJ) ("Butise")

[8] Trustees, Two Oceans Aquarium Trust v Kantey and Templer (Pty) Ltd 2006

(3) SA 138 (SCA) para 10

[9] International Shipping Co (Pty) Ltd v Bentley 1990

(1) SA 680 (A) at 700 E-I

[10] Probst v Pick 'n Pay Retailers (Pty) Ltd [1998] 2 All SA 186 (W) ("Probst v Pick 'n Pay")

[11] Probst v Pick 'n Pay page 20

[12] Cenprop Real Estate (Pty) Ltd and Another v Holtzhauzen 2023

(3) SA 54 (SCA) (“Cenprop”) par 28 - 19

[13] Elgin Fireclays Ltd v Webb 1947 (4) SA 744 (A) at 749–750 and Cele v Passenger Rail Agency of South Africa 2023 JDR 1743 (GP) par 33

[14] As per Probst v Pick 'n Pay supra

[15] Mthembu

[16] par 23

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