

SOUTH AFRICA / JUDGMENT

De Wet v Gateway Plaza Meatworld CC t/a Meatworld (55046/2017) [2019] ZAGPPHC 1069 (28 November 2019) [2019] ZAGPPHC 1069

COURT

North Gauteng High Court, Pretoria

BEFORE

Neukircher

CASE / FILE NUMBER

55046/2017

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

Case no: 55046/2017

28/11/2019

In the matter between:

JOHANNA ELIZABETH DE WET

Plaintiff

and

GATEWAY PLAZA MEATWORLD CC t/a

MEATWORLD

Defendant

NEUKIRCHER J:

1] On 13 May 2017 the plaintiff was a customer at the Gateway Plaza Meatworld (the defendant} in Centurion with her husband when she slipped and fell on the floor of the shop landing on her right knee and cracking

her patella. She alleges that as a result of the fall she then required medical attention.

2] The present adjudication is in respect of merits (liability) only and the quantum of any damages plaintiff may have suffered was postponed by agreement between the parties and an order was made separating merits

and quantum at the outset of this matter.[1]

3] CCTV footage of the incident was handed in by agreement between the parties. The entire footage is approximately 15 minutes long and starts a few minutes before the plaintiff and her husband enter the store, shows her slip and fall and continues for approximately 9 minutes after that.

4] It is common cause that:

4.1. the plaintiff fell in the defendant's store;

4.2 many people[2] walked over the area where plaintiff slipped prior to her fall and approximately 19 walked over the same area after her fall, including

her husband and the store manager (Mr Jose Jardim - Mr Jardim) and none of them slipped or stumbled and fell:

4.3 the photographs taken by plaintiff's husband of the floor after she fell were admitted into evidence.

4.4 it is not the defendant's case that any signs or warnings were placed in the area to warn of a dangerous/slippery floor or spillage;

THE WITNESSES

PLAINTIFF-MRS DE WET

5] Her evidence was that on Saturday 13 May 2017 she and her husband went shopping for food for Sunday lunch as they had invited friends over to eat. It was quite cold out and she was wearing black ankle boots with a wedge rubber heel and a leather sole which she had worn many times before. She entered the shop through the glass entrance door and went through the turnstile. Just after the entrance and to her left was a counter with plates of snacks[3] on it for customers to taste. After that there is a passage to the various fridges.

6] The only exit to the shop is behind the tills.

7] Just after the counter, but before she reached the fridges her left leg slipped out from under her and she fell onto the palm of her right hand and her right knee. She felt pain from her knee "shoot through [her] body" and it was impossible for her to get up. As she sat on the floor she looked to see what may have caused the fall and she saw oil splatters[4] around her and she asked her husband to take photos on his cellphone for her. She pointed the drops out to him and he took the photos.[5]

8] After the fall she was approached by a "blond lady", a shop assistant[6] (Mrs Jardim). Mrs Jardim pointed out a yellow caution board to her that was standing with its face to the customer entrance in front of a "braai trolley" packed with packaged meat on display in front of a fridge. The plaintiff's response that this board was not there before her fall - it appeared only after her fall. Mrs Jardim told her there was nothing on the floor. After that Mr Jardim[7] came to talk to them and her husband became quite agitated. He kept stating that there was no board when she fell and the floor was wet. Mr Jardim gave them his card.

THE PHOTOGRAPHS

9] Five photographs were introduced into evidence during the plaintiff's evidence of which three are relevant. They show the following:

9.1 Photo 2: this shows the two parallel marks approximately 2cm long which she says were brought about by her heel leaving scuff marks on the floor when she slipped . These are circled and marked "A". There are also 3 other circles marked "B", "C" and "D" which the plaintiff alleges to be the oily/greasy patches on the floor;

9.2 Photo_4: this shows the plaintiff's hand pointing to the oil on the floor;

9.3 Photo 5: this shows the plaintiff's boot and she says one can see oil splatters on the floor.

I do bear in mind that the floor has a very dark speckled surface and the photos have been enlarged.

THE CCTV FOOTAGE

10] From the footage it is clear that there are quite a number of customers walking into the frame, around the counter where the food samples are kept, and in the passage towards the meat fridges and in between the fridges.

11] At 10:28:14 the plaintiff and her husband walk into the frame of the camera and at 10:28:17 the plaintiff slipped .

12] at 10:28:50 the plaintiff's husband is seen standing in the same spot where she slipped and at 10:31:05 the plaintiff and her husband are seen exiting the frame of the footage. He supports her while they walk.

13] At 10:29:20 Mrs Jardim can be seen approaching the plaintiff who was still sitting on the floor. She can be seen conversing with the plaintiff and the plaintiff pointing to the floor and Mrs Jardim bends over to look at the floor. Mrs Jardim brushes her foot over the spot where the plaintiff alleges the oil/grease droplets were and her husband can be seen taking photographs.

14] At 10:35:53 the yellow caution stand is visible in the footage - it is folded up facing the fridges on the right hand side of the store resting on the back of another fridge in front of a braai trolley which has packaged meat on it. It is common cause that, at this stage, it was not visible to anyone entering the store.

15] In the last 9 minutes of the footage it is quite apparent that no one comes to clean the area and 19 other people walk over the spot without incident.

16] What is also evident from the footage is that Mr Jardim walked to the spot where plaintiff fell. sees nothing and turns and walks

away.

17] The product manager. Jacques. is seen coming into view of the camera holding 2 yellow caution boards. he then disappears from view

and return with only one which he places about a meter away and slightly in front of the spot where the plaintiff fell.

18] None of the witnesses called could explain Jacques conduct and he was not called to give evidence.

19] During plaintiffs cross-examination it was put to her that the defendant's case is that there was no spillage and that even if there

was any substance on the floor, it was so negligible that no-one could see it. The fact that the plaintiff slipped on any substance

does not render the defendant negligent.

20] During plaintiff's cross-examination, she conceded that the oily/fatty/ greasy[8] substance on the floor was not visible when standing and the speckled floor surface also makes it difficult to see anything; that it is difficult to discern anything on Photo 2 and that someone merely looking at the photo would not know what they were looking at. She also had no comment regarding the statement put to her that her husband walked over the same area where she had slipped several times, as had other customers, without any of them slipping.

21] After her evidence, the plaintiff then closed her case. Mr West then applied for absolution from the instance. I handed down an extempore judgment in which absolution was refused. That judgment is part of the record.

THE DEFENDANT'S CASE

22] The defendant then called 2 witnesses:

22.1. Mrs Maria Jardim; and

22.2 Mr Jose Jardim

MRS JARDIM

23] Mrs Jardim, at the time, was a supervisor at the defendant's store in Centurion. She was on duty on the day of the incident. She

states that she was in the kitchen making a cup of coffee when she saw the plaintiff fall. She went to her to see what had happened and asked but the plaintiff didn't speak to her. Plaintiff's husband was taking photographs with his phone and kept repeating "You see? You see?". She told them both that she could not see anything on the floor. She also rubbed her shoe on the floor but there was nothing slippery.

24] She testified that plaintiff's husband kept stating that there was no sign to warn about the floor which is when she pointed out the yellow caution sign standing in front of the packaged meat trolley facing the entrance. Plaintiff's husband kept shouting that he was going to sue which is when she left to call Mr Jardim.

25] Mrs Jardim 's evidence was that the store has 2 cleaners at the front of the shop and one at the back that cleans the meat packing area, toilets and kitchen. The two at the front of the shop each have a bucket, chemical soap that can clean a fatty substance, and mops and they walk around the fridges, aisles and cashiers to check if there is spillage and if so they put the yellow caution boards out and clean the area. They are on duty from 07h00 until 18h00 whilst the shop is open.

26] At the time of the incident, she did not call the cleaners as "there was nothing to be cleaned".

27] She conceded during cross-examination that there were no yellow caution boards visible when the plaintiff entered the store and that it was only after the incident that Jacques put the one standing at the braai to face the entrance and also put another one close to the incident area - she did not see him do either- and she could not explain why he did (or would do) this.

28] Mrs Jardim pointed out that this was the first time in the 13 years she had worked for defendant that someone had fallen in the store.

29] As to whether the snacks served at the entrance of the shop would drop a substance on the floor, and whether customers would walk

around with these snacks and eat them whilst shopping, Mrs Jardim denied these statements or simply said that she "didn't know" or it was "not within [her] knowledge". In re-examination she did state that, according to the video, no customer was seen walking around with a snack in their hands.

30] She also confirmed in re-examination that if there was something on the floor, she would call the cleaners to clean the spot. She would either stand on the spot until the cleaners came or she would have someone fetch the caution board to put over the spot until it could be cleaned. She did not do so on 13 May 2017 as there was nothing on the floor to be cleaned.

MR JARDIM

31] Mr Jardim was the floor manager in May 2017. Amongst his duties was to check that the floor was clean and make sure that the shelves were stocked. He stated "hygiene and cleanliness were my job". He also was adamant that "my floors were spotless".

32] He did not witness the plaintiff's fall but was called by Mrs Jardim. He went to the plaintiff and her husband and he stated that

plaintiff's husband was very angry and insisted that there was grease or fat on the floor which he said to them there was not. He gave him a business card and told them to phone Head Office it there was a problem[9] as the defendant's insurance would deal with the situation, and he said that he was "sorry it happened".

33] Mr Jardim helped plaintiff to her husband's vehicle and then went back into the shop and went to have a look at the spot where she

had fallen. He rubbed his feet in the vicinity of the particular spot which plaintiff had pointed out. As he did not see anything he went back to work.

34] As to the defendant's procedures that were in place to deal with any spillage, Mr Jardim testified the following:

34.1 that there were 2 permanent staff members at the front of the shop who were permanently on the floor to clean and mop up any spillage. They each had a bucket and mop and used a special degreasing agent to clean the floor after which they would dry the area;

34.2 there is a machine that has a scrubbing pad on the front and a tray behind which sucks up excess water. The machine uses a special detergent to scrub the floor. There are 2 operators who operate the machine rotationally[10] throughout operating hours and it did its rounds every 10-15 min:

34.3 his job was to be on the floor and he would also check the floor to ensure it was clean. If he saw something to be cleaned he would either call the cleaners or he would get the blockman at the front entrance to call them.

35] Mr Jardim conceded:

35.1 that he never took a close look at the spot where the plaintiff had slipped;

35.2 that there was a counter at the entrance which served fatty/greasy finger foods[11] which customers could take and eat whilst continuing to shop;

35.3 that these finger foods could drop an oily substance on the floor;

35.4 that the yellow caution boards were not initially visible and were later placed in a visible position by Jacques[12];

35.5 that yellow caution boards were there to warn customers of a slippery floor:

35.6 the two marks on PHOTO 2 in circle "A" could be marks left by the heel of plaintiff's shoe when she slipped;

35.7 the plaintiff could well have been in a better position to see the 4-5 oily drops after she had slipped and whilst she was sitting

on the floor than he, as he never bent over to take a close look at the floor;

35.8 that in the 15 minutes the CCTV footage covered the specific area, neither the cleaners nor the floor machine were seen;

36] Mr Jardim was, however, adamant that neither Mrs Jardim, nor Jacques nor he had called the cleaners as there was nothing on the floor to be cleaned.

37] The defendant then closed its case.

THE DEFENDANT'S ADMISSIONS

38] At the end of the defendant's case. Mr West made the following concessions:

38.1 that the defendant admits that there is a duty of care owed to its customers;

38.2 that a failure to fulfill this duty of care would constitute a wrongful omission in respect of which any harm would be reasonably foreseeable.

THE QUESTION

39] Given the admissions by the defendant before and after close of evidence. the question to be answered is the following: did the defendant have sufficient safety procedures in place to ensure the safety of its customers?

THE WITNESSES

40] In my view the credibility of the witnesses does not play a big role in this case. Insofar as the above question is concerned, I must remark as follows:

40.1 the plaintiff struck me as a truthful and honest witness. She sought to assign sole blame for her fall to the defendant which is normal under the circumstances;

40.2 Mrs Jardim was a difficult witness - not (in my view) because she was untruthful, but rather because it was very clear that there was a large communication and language barrier that kept rearing its head. I will say however that she did not always listen to the questions put to her and it was clear that she was an extremely loyal and faithful employee. This could very well give rise to the added imputation of a lack of forthrightness and dishonesty but that was not my impression of her;

40.3 Mr Jardim was an excellent witness. He was honest and truthful and made the right concessions where and when required to.

41] I must also remark that on issues that were important, such as the cleaners and their duties, the warning boards, the plaintiff and her husband's demeanor and whether an incident like this had occurred previously/again during the length of the CCTV footage, Mrs and Mr Jardim corroborated each other in material respects.

42] Mr van der Merwe urged me to draw a negative inference from the fact that Jacques was not called to testify for defendant regarding the issue of why he had placed the 2 yellow caution boards as he had. In my view, given the totality of the evidence and the concessions made by the defendant, this issue must be seen in the broader context of the case and not in isolation of the other evidence presented. The same remark applies in respect of the plaintiff's failure to call her husband as a witness.

THE LAW

AD THE LEGAL DUTY AND WRONGFULNESS

43] In *South African Hang and Paragliding Association v Bewick*[13] the court stated the following:

"[5] The respondent's case is therefore based on an omission or failure to do something as opposed to positive culpable conduct. That brings about a different approach to the delictual element of wrongfulness. As has by now become well established, negligent conduct manifesting itself in the form of a positive act which causes physical injury raises a presumption of wrongfulness. By contrast, in relation to liability for omission and pure economic loss, wrongfulness is not presumed and depends on the existence of a legal duty. The imposition of this legal duty is a matter for judicial determination according to criteria of public and legal policy consistent with constitutional norms (see eg Gouda Boerdery BK v Transnet 2005

(5) SA 490 (SCA)} para 12; *Country Cloud Trading CC v MEC, Department of Infrastructure Development* 2015

(1) SA 1 (C)} paras 22-25).

[6] On occasion the some principles had been formulated _somewhat differently, namely that wrongfulness depends on whether or not it would be reasonable, having regard to considerations of public and legal policy, to impose delictual liability on the defendant for the loss resulting from the specific omission. No objection can be raised against this formulation, as long as it is borne in mind that reasonableness in the context of wrongfulness has nothing to do with the reasonableness of the defendant's conduct, which is an element of negligence, but concerns the reasonableness of imposing liability on the defendant for the harm resulting from his or her omission (see eg *Le Roux & others v Dey* (Freedom of Expression Institute and Restorative Justice Centre as amici curiae 2011 (3) SA 274 (CC) para 122). Since wrongfulness is not presumed in the case of an omission, a plaintiff who claims on this basis must plead and prove facts relied upon to support that essential allegation (see eg *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency* [2008] ZASCA 134; 2009 (2) SA 150 (SCA) para 14)." (my emphasis)

44] Given the defendant's admissions as contained in paragraph 38 supra, this issue has been put to bed.

45] What remains to be decided is the "reasonableness of the defendant's conduct" as the remaining element of negligence.

THE DEFENDANT'S CONDUCT

46] Mr West has argued that before the court can decide the element of wrongfulness, it must first be determined whether factually, there was a spillage^[14] which caused the plaintiff to slip.

47] He argues that, at best for the plaintiff, there are two mutually destructive versions before the court in regard to the issue of whether or not there was a spillage.

48] The plaintiff's version of the spillage was not supported by any corroborating evidence other than the photographs which do not show any evidence of droplets the size of a 10c coin. What they do show is 3 slightly darker patches on a speckled floor and 2 parallel marks about 2cm in length which plaintiff says were made by her shoe when she slipped.

As far as the latter is concerned the CCTV footage also shows the plaintiff seated on the floor in the presence of Mrs Jardim dragging

the heel of her shoe on the floor. As there is no time stamp on the photographs, it is not possible to discern whether those marks were made when the plaintiff fell or when she dragged her heel on the floor.^[15]

49] It is also so that neither Mrs Jardim nor Mr Jardim saw any evidence of the spillage.

50] However, the words of Stegmann J^[16] come to mind when weighing the evidence on this issue and deciding , on the probabilities, what the cause of the plaintiff's fall was:

"In short, all three members of the Court were of the view that the plaintiff had the onus of proving negligence on the part of the defendants; and that negligence on their part would be proved if the fact was that the slippery spillage had remained on the floor for a period longer than was reasonably necessary to discover it and clear it up, and not otherwise: and where the learned Lords of Justice differed was over the question of whether the plaintiff's evidence that she had slipped and fallen in a spillage on the shop floor was sufficient, in the absence of rebutting evidence, to justify the prima facie inference that the slippery spillage had remained on the floor longer than was reasonably necessary to discover it and clear it up. The majority seem to have held that such an inference was justified; and Ormrod LJ held that it was not. The latter view is, perhaps, the more strictly logical.

Of this result some may be tempted to repeat the adage that hard cases make bad law. In my judgment, however, the case should rather be seen to illustrate a more positive, and considerably more important, adage, to the effect that the genius of the common law is not logic so much as experience. There is a sound reason of /ego/ policy why the majority view should be followed: it is that in such a case the plaintiff generally cannot know either how long the slippery spillage had been on the floor before it caused his fall, or how long was reasonably necessary, in all of the relevant circumstances {which must usually be known to the defendant), to discover the spillage and clear it up. When the plaintiff has testified to the circumstances in which he fell, and the

apparent cause of the fall, and has shown that he was taking proper care for his own safety, he has ordinarily done as much as it is possible to do to prove that the cause of the fall was negligence on the part of the defendant who, as a matter of law, has the duty to take reasonable steps to keep his premises reasonably safe at all times when the members of the public may be using them (cf *Alberts v Engelbrecht* (supra)). It is therefore justifiable in such a situation to invoke the method of reasoning known as *res ipso loquitur* and, in the absence of an explanation from the defendant, to infer *prima facie* that a negligent failure on the part of the defendant to perform his duty must have been the cause of the fall. As explained in *Arthur v Bezuidenhout and Mieny* (supra), this does not involve any shifting of the burden of proof on to the defendant: however, it does involve identifying the stage of the trial at which the plaintiff has done enough to establish, with the assistance of reasoning on the lines of *res ipso loquitur*, a *prima facie* case of negligence on the part of the defendant, so that unless the defendant meets the plaintiff's case with evidence which can serve, at least to invalidate the *prima facie* inference of negligence on his (the defendant's) part, and so to neutralise the plaintiff's case, judgment must be entered for the plaintiff against the defendant. In this situation the defendant does not have to go so far as to establish on a balance of probabilities that the accident occurred without negligence on his part: it is enough that the defendant should produce evidence which leads to the inference that the accident which caused harm to the plaintiff was just as consistent with the absence of any negligent act or omission on the part of the defendant as with negligence on his part. The plaintiff will then have failed to discharge his onus, and absolution from the instance will have to be ordered.' "

(my emphasis)

51] Thus, based on the maxim of *res ipso loquitur*, and based on the evidence presented by plaintiff, it would appear that she did indeed slip and fall as a result of something on the floor of the defendant's shop.[17]

52] The question then to be posed is whether the procedures put in place by the defendant were sufficient to prevent the foreseeable occurrence of harm.

53] This test was formulated in *Kruger v Coetzee*[18] as follows:

"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[19] ; and
 - (ii) would take reasonable steps to guard against such occurrence:
- (b) the defendant failed to take such steps [20]."

54] In paragraph 6.1 to 6.6 of the particulars of claim, the plaintiff has set out the manner in which she alleges the defendant has breached its duty of care. These include:

"...that they failed and/or neglected to:

6.1 properly and clearly indicate, near or at the place where the plaintiff slipped that floor surface contained oily/greasy/fatty substance and that all areas of the premises were safe to walk on...:

6.5 take adequate measures to prevent injury to their customers who made use of their premises and/or

6.6 adequately prevent and or clean the fatty/oily/greasy substance from the area in which the plaintiff slipped, alternatively clean the area within a reasonable time."

55] At the end of the trial and after all the evidence is presented the question is

" .. .whether or not the evidence as a whole justified the inference that the respondent was negligent ..." [21]

56] In my view the plaintiff has failed to acquit this burden. I am of the view that the defendant could have done no more than it did to ensure that the environment within which customers shopped was safe. The fact is that approximately 32 other customers traversed the same area without incident. The fact that the cleaners were not seen in the 15 minutes that the CCTV footage ran does not mean that they were not present - they may have done their rounds just before the start of the footage

and again just after the footage ended.

57] As was stated in *Moneoli v Woolworths (Pty)Ltd* (supra)[22]

"[39] The case of *City of Salisbury v King* 1970 (2) SA 528 (RA) had facts remarkably similar to those in this case: in that case a woman slipped and fell on a piece of vegetable matter; the place was in a vegetable market. The Court said at 528H - 529A:

'It would not be possible for the appellant to prevent vegetable matter finding its way on to the floor no matter what precautions were taken. It follows from this that the mere presence of vegetable matter on the floor of the market during marketing hours is not, in itself, prima facie evidence of negligence on the part of the defendant.'

58] Given the above and the facts of this matter, I thus find that the plaintiff has not proven negligence on the part of the defendant.

ORDER

59] Thus the following order is made:

The plaintiff's claim is dismissed with costs.

NEUKIRCHER J

JUDGE OF THE HIGH COURT

Date of hearing: 19 - 22 November 2019

Date of judgment: 28 November 2019

For plaintiff: Adv van der Merwe

Instructed by: Gildenhuis Malatji Inc

For defendant: Adv West

Instructed by: VHI Attorneys

[1] The order reads: 1) Merits (liability) is separated from the quantum. 2) Quantum is postponed sine die

[1] The order reads:

1) Merits (liability) is separated from the quantum.

2) Quantum is postponed sine die

[2] Mr West puts the count at 13

[3] Such as sausages with toothpicks and snacks that were easy to eat with one's hand

[4] She said there were 4-5 drops each about the size of a 10c coin

[5] There were 5 colour photographs in all which were admitted into evidence.

[6] Her name is Mrs Jardim and she was defendant's first witness

[7] No relation to Mrs Jardim. He was the store manager

[8] Her words and per the particulars of claim

[9] He could not remember if they said anything to him at the time

[10] ie if one is on a tea or lunch break, the other operates the machine

[11] Most on a cocktail toothpick

[12] Although he did say he did not know why Jacques did this as, according to him, there was nothing on the floor and he thought

Jacques actions were "silly"

[13]2015 (31 SA 449 (SCA)

[14] This being 4-5 droplets the size of a 10c coin of oil/grease/fat on the floor

[15] The time stamp of the photograph could have been correlated to the time stamp on the CCTV footage

- [16] In *Probst v Pick 'n Pay Retailers (Pty) Ltd* [1998] 2 B All SA 186 (W) and referring to the judgment in the English Court of Appeal in *Word v Tesco Stores Ltd* [1976] 1 All ER 219
- [17] Sometimes, and where the plaintiff is not in a position to produce evidence on a particular aspect, less evidence will suffice to establish a prima facie case where the matter is particularly within the knowledge of the defendant. See for example *Union Government (Minister of Railways) v Sykes* 1913 AD 156 at 173- 4.
- [18] 1966(2) SA 428 (A) at 430E· G
- [19] This is conceded by the defendant: see *Brauns v Shoprite Checkers (Pty) Ltd* 2004 (6) SA 211 (E) at 217E
- [20] There is an evidentiary burden placed upon the defendant to show what steps have been taken by it . See *Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 37A-38G
- [21] *Moneoli v Woolworths (Pty)Ltd* 2000 (4) SA 735 (W) at par 24
- [22] At par 39

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