

SOUTH AFRICA / JUDGMENT

Lombard v Mcdonald's Wingtip (38117/2020) [2022] ZAGPPHC 877 (14 November 2022)

[2022] ZAGPPHC 877**COURT**

North Gauteng High Court, Pretoria

BEFORE

Vuma

CASE / FILE NUMBER

38117/2020

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Source record**FLYNOTES:**

SLIP AND FALL AT MCDONALD'S – DISCLAIMER NOTICE

Delict

– Slip and fall – While leaving premises –

Disclaimer notice – Whether the area was wet –

Size,

wording and visibility of the disclaimer notice – Consumer
Protection Act 68 of 2008, s 49.

IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE

NO: 38117/2020

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED

14

November 2022

Closing

arguments heard on:

18

August 2022

Judgment

delivered on: 14 November 2022

In

the matter between: MANDIE
 LOMBARD
 Plaintiff
 and
 MCDONALD'S
 WINGTIP
 Defendant

JUDGMENT

VUMA AJ

INTRODUCTION

[1]. On 10 June 2019 at about 12h30 Ms Lombard, (“the plaintiff”), attended to the business premises of the defendant, MSA Devco (Pty) Ltd t/a McDonald’s Wingtip, (“McDonald’s”), situated at the Wingtip Crossing

Shopping Centre, Montana in Pretoria.

[2]. At the outset the parties agreed that the determination of liability would be separated from the determination of quantum which was postponed sine die. This court is therefore called upon to only determine whether or not the defendant is liable as alleged by the plaintiff.

[3]. The trial commenced on 2 August 2022 and ran until 3 August 2022. Pursuant to an application by the plaintiff, the Court conducted an inspection in loco on 3 August 2022.

[4]. During the trial, video footage was admitted into evidence showing the plaintiff slipping on the ramp the moment her right foot left the rubber carpet (which partially covered the ramp area) and stepping on the tiled area.

[5]. It is common cause that in her Particulars of claim the plaintiff alleges that on or about 10 June 2019 she attended the defendant’s principal place of business to place a food order and that upon leaving the premises, she slipped and fell on a wet black rubber carpet on the ramp area in front of the defendant’s store entrance.

[6]. On 2 August 2022, during the cross examination of the plaintiff, the plaintiff’s attorneys served a notice of intention to amend paragraph 4 of the plaintiff’s particulars of claim by deleting the entire paragraph and substituting it with the following:

“On or about 10 June 2019 and around 12h30 in the afternoon the Plaintiff attended to the Defendant’s principal place of business

referred to in paragraph 2 supra (“the premises”) to place a food order. Upon leaving the Defendant’s premises the Plaintiff slipped in front of the Defendant’s store entrance on the wet tilted exit ramp of the premises, immediately when her foot left the black rubber carpet, and fell (“the incident”).”

[7]. The effect of the amendment is that the plaintiff now alleges that she slipped on the wet tiled exit ramp, not the black rubber carpet.

[8]. In response to the plaintiff's amended particulars of claim, the defendant consequently amended its plea and denied the plaintiff's amended paragraph 4. Despite the defendant's admission that the plaintiff fell on the ramp at the entrance of McDonald's, the defendant however denies that the carpet was wet.

PLEADINGS

[9]. In paragraph 7 of her Particulars of claim, under the heading "EXISTING LEGAL DUTY OF CARE", the plaintiff alleges the following:

"At all material times there rested a legal duty of care on the defendant to:

- 7.1. exercise due and proper control of its premises and the building;
- 7.2. take all necessary steps to prevent the occurrence of the incident;
- 7.3 ensure that the exit of its premises is clear of wet, slippery and possibly dangerous surfaces;
- 7.4. take all steps necessary to ensure the safety of the plaintiff;
- 7.5. take all steps necessary to prevent the occurrence and existence of a dangerous situation;
- 7.6. take all steps necessary to remove an existing dangerous situation as soon as possible; and
- 7.7. take all steps necessary to warn the plaintiff of the existence of a dangerous situation by inter alia, but not limited to, placing signs alerting the plaintiff of wet slippery surfaces and of the risk of falling, in and around its premises;
- 7.8. take all steps necessary to cordon off an area which is wet."

[10]. In paragraph 8 of her Particulars of claim under the heading "BREACH OF THE EXISTING LEGAL DUTY OF CARE", the plaintiff alleges the following:

"The defendant negligently breached the alleged duty of care which rested upon it, in one or more of the following respects:

- 8.1. It failed and/or neglected to exercise due and proper control of the premises and building;
- 8.2 It failed and/or neglected to take all reasonable steps necessary to prevent the occurrence of the incident;
- 8.3. It failed and/or neglected to ensure that the exit of its premises is clear of wet, slippery and possibly dangerous surfaces;
- 8.4 It failed and/or neglected to take all steps necessary to ensure the safety of the plaintiff;
- 8.5. It failed and/or neglected to take all necessary to prevent the occurrence and existence of a dangerous situation;

8.6. It failed and/or neglected to take all steps necessary to remove an existing dangerous situation as soon as possible; and

8.7. It failed and/or neglected to take all steps necessary to warn the plaintiff of the existence of a dangerous situation by inter alia, but not limited to, placing signs alerting the plaintiff of wet slippery surfaces and of the risk of falling, in and around its premises;

8.8 take all steps necessary to cordon of (sic) an area which is wet.”

[11]. In response to the defendant’s Plea, the plaintiff alleges in her Replication that:

11.1 She was not aware of the exemption clause/ notice and it was not drawn to her attention by the defendant in a manner or form that satisfies the requirements of section 49(3) of the Consumer Protection Act 68 of 2008 (“the CPA”);

11.2 Alternatively, that the clause is ambiguous and does not exclude liability for damages suffered where the incident occurred;

11.3 The disclaimer notice does not rid the defendant of its duty of care and that any person exiting the restaurant, carrying food will not be able to notice wet and slippery surfaces on the mat outside of the door; and

11.4 The defendant had a duty to ensure that the area remains dry or at least

place a warning sign to alert customers that the floor is wet and slippery and that additional care should be taken by persons exiting the restaurant to prevent slip and fall incidents from accruing.

[12]. In reply to the defendant’s Request for further particulars of 30 June 2022 in terms of which the defendant requested particulars of the steps that the plaintiff alleges the defendant ought to have taken to exercise due proper control of its premises, the plaintiff stated that:

12.1. The defendant failed to:

12.1.1. Ensure that the rubber mat covers the entire ramp area;

12.1.2 Ensure that the rubber mat is affixed or placed in a position ensuring that it will not move;

12.1.3 Place a “floor is wet” sign at the area on the ramp where the incident took place; and

12.1.4 Keep the ramp area dry.

12.2. The defendant allowed customers to make use of the ramp which is inherently dangerous;

12.3. In response to the defendant’s enquiry as to whether the plaintiff noticed the sign, the plaintiff responded that she does not recall that she saw the notice and that the position of the sign is a matter for evidence and legal argument; and

12.4. The plaintiff also responded that she was not carrying any food at the time when the incident occurred but that the defendant reasonably foresaw that customers might have items in their hands whilst using the ramp when exiting the premises.

THE DEFENDANT'S PLEADED CASE

[13]. In its plea the defendant denies wrongfulness and thus liability and relies on a "disclaimer notice" which states that the defendant would not be liable for any "loss and/or damages sustained to 'her person' and/or 'her' property whilst on the premises for whatsoever reason."

[14]. The defendant admits that the plaintiff fell on the ramp at the entrance of the premises occupied by the plaintiff but denied that the carpet was wet (as originally pleaded by the plaintiff). The defendant consequentially amended its plea and denied the plaintiff's amended paragraph 4.

[15]. The defendant admits that it owed the plaintiff, as a visitor of the premises, a general duty of care to take all reasonable steps to ensure that the defendant's premises was generally safe but contends that it complied with the duty of care owed to the plaintiff.

[16]. However, the defendant contends that the disclaimer notice at the entrance of the door was clearly and prominently displayed and in terms of the disclaimer notice, the plaintiff was notified of, accepted and agreed that:

16.1 she entered the premises, its surrounding areas and facilities at her own risk;

16.2 neither the defendant nor its suppliers, employees and/or representatives shall be responsible or liable in respect of any theft and/or loss and/or damages sustained to property and/or the person of the plaintiff as a customer whilst on the premises for whatsoever reason; and

16.3 by entering onto the premises and leaving same the plaintiff represented to the defendant that she agreed to be bound by and accepted the terms of the disclaimer notice.

ISSUES

TO BE DETERMINED

[17] The parties' approach as relates to what the issues for determination are is different, with the plaintiff submitting that the first the issue for determination is the question of negligence on the part of the defendant, and thereafter wrongfulness. On the contrary, the defendant submits that this court is called upon to determine:

17.1 whether the defendant is absolved of liability by virtue of the disclaimer notice;

17.2 whether the spot where the plaintiff fell was wet;

17.3 if it be found that the surface was wet, whether the defendant failed in its duty towards the plaintiff, in that the defendant negligently breached the legal duty of care owed to the plaintiff on the grounds alleged by the plaintiff.

[18]. The defendant submits that if this court finds that the disclaimer notice is applicable and enforceable, the plaintiff's claim must be dismissed with costs and there is no need to consider the aspects of wrongfulness and negligence.

[19]. Similarly, if the court finds that the disclaimer notice is not applicable and enforceable and that the plaintiff did not discharge her onus to prove that the area where she fell was wet (given the mutually destructive versions of the plaintiff and the witnesses of the defendant), the plaintiff's claim must be dismissed with costs, alternatively the defendant must be absolved from the instance and there will be no need for the court to consider the aspects of wrongfulness and negligence.

[20]. In the same breadth, were the court to find that the plaintiff did discharge her onus of proving that the area where she fell was wet despite the mutually destructive versions of the plaintiff and the witnesses of the defendant, then the Court must determine whether the defendant was negligent on the grounds alleged by the plaintiff, failing which the plaintiff's claim must be dismissed with costs, alternatively the defendant must be absolved from the instance.

THE DISCLAIMER NOTICE

[21]. The disclaimer notice reads as follows:

"ALL PERSONS ENTERING McDONALD'S AND USING ITS FACILITIES, INCLUDING DRIVE THROUGH AND PARKING AREAS, DO SO ENTIRELY AT THEIR OWN RISK. NEITHER McDONALD'S NOR ITS SUPPLIERS, EMPLOYEES AND OR REPRESENTATIVES SHALL BE RESPONSIBLE AND OR LIABLE IN RESPECT OF ANY THEFT AND OR LOSS AND OR DAMAGES SUSTAINED TO PROPERTY AND OR THE PERSON OF ANY CUSTOMER AND OR EMPLOYEE OF McDONALD'S WHILST ON THE PREMISES FOR WHATSOEVER REASON."

THE INSPECTION IN LOCO

[22]. An inspection in loco was conducted at the instance of plaintiff's counsel, the primary purpose being to afford the court an opportunity to observe

the area where the incident occurred. The following was observed by the parties and recorded formally:

22.1. The distance from the start of the pedestrian crossing in the parking area to the start of the tiled ramp area is 6.7 meters;

22.2. The distance from the start of the ramp to the entrance door where the disclaimer notice is displayed is 3.5 meters;

22.3. The distance of the ramp area/slope is 2.11 meters;

22.4. The length of the rubber carpet is 1, 76 meters and the width is 1, 47 meters;

22.5. The size of the disclaimer notice is 28.5 cm (length) and 44 cm (width);

22.6. The "caution: floor may be slippery when wet" sign is 11.5 cm (length) and 19 cm (width).

[23]. The court also observed the following:

23.1. The tiles are “smoother” as compared to the texture of the rubber carpet which has “resistance”;

23.2. Readability of the disclaimer notice:

(a). Standing on the other side of the road (from where the pedestrian crossing begins on the tarred road) one is able to notice the disclaimer notice and the caution notice, however this does not include the readability of the notice;

(b). The attraction to the disclaimer notice and caution notice ‘is enough from the start of the zebra crossing’.

(c). From where the tiled ramp begins and whilst still standing on the road, one is able to read the contents of the disclaimer notice and caution notice.

THE BURDEN OF PROOF

[24]. The plaintiff concedes that she bears the onus to prove the delictual elements on a balance of probabilities, conversely arguing that the defendant bears the onus in proving its defence to wrongfulness in re its disclaimer notice (exemption clause) on a balance of probabilities.

THE EVIDENCE

THE PLAINTIFF’S CASE

[25]. The plaintiff led the evidence of its only witness, viz, the plaintiff herself who testified that she is the person appearing in the video footage of the incident. On 10 June 2019 she visited the defendant’s restaurant and upon exiting McDonald’s, just as a foot left the rubber carpet as she walked down the tiled ramp towards her motor vehicle, she stepped on the tiles and fell. The tiled ramp had a black rubber carpet which partially covered the tiled area. After she fell, she touched the rubber carpet and the tile and felt that they were both wet.

[26]. Three school children saw her fall and because she could not get up, they went into the restaurant and called for help. An employee of the defendant came outside and the plaintiff indicated to this employee that the area was wet, whereafter the employee placed a “wet floor” sign on the ramp. The plaintiff told the employee to call her husband who was inside the restaurant. He came out and assisted the plaintiff because she could not get up.

[27]. She also testified that she could not recall whether or not she saw the disclaimer notice upon entering the restaurant. When she was referred to the disclaimer notice, she testified that the wording of the disclaimer notice was not clear to her nor was it clear that the disclaimer covered the area where the incident occurred, further stating that the words contained in the notice are vague as to the area to which the disclaimer notice refers. Furthermore, once one has walked up the ramp, one will have to look down in order to read the disclaimer notice, which disclaimer notice in red colours which colours are the same as MacDonalds’ colours. In her opinion, she would not have fallen had the defendant ensured that the rubber carpet covered the entire ramp

and had she known that the area was dangerous, she would have used another exit. Due to that event, she now has to wear shoes of different sizes and had multiple operations.

[28]. Under cross examination she testified that she looked ahead to the road when she walked down the ramp and that it could therefore not be expected of her in the circumstances to have looked down at the specific moment when her feet left the rubber carpet and touched the tiled.

28.1 The plaintiff conceded that she could not dispute the defendant's version that:

28.1.1 Ms Matseke had cleaned a sticky spot on the opposite side of the rubber carpet where the plaintiff slipped approximately 10 to 15 minutes before the incident occurred;

28.1.2. Ms Matseke's version that the restaurant was not busy at the time and she would have checked the area where the incident occurred in 30 minutes time but before she could do so, the incident occurred;

28.2 The plaintiff conceded that:

28.2.1. she assumed because the side where she had touched was wet that the side where she fell was also wet;

28.2.2 she did not touch the tile or the rubber carpet where she had fallen. She touched the carpet and the tile on the opposite side of where she fell;

28.2.3 the rubber carpet did not move at the time of the incident;

28.2.4 she did not have food in her hand when she entered the restaurant or when the incident occurred.

[29]. The plaintiff was confronted with the defendant's version that:

29.1 She entered the plaintiff's premises at least twice;

29.2 The disclaimer notice was noticeable and visible and that the notice had come to the plaintiff's attention at least twice before the incident occurred;

29.3 She had fallen because she simply lost her footing;

29.4 Ms Matseke was the employee who went to offer her assistance after the plaintiff had fallen and Ms Matseke denies that:

29.4.1. she placed a 'wet floor' sign on the ramp after the incident occurred; 12

29.4.2. the tile and the rubber carpet on the ramp were wet since she had checked the area 10-15 minutes before the incident and immediately after the incident, after the plaintiff's husband assisted her;

29.4.3. the plaintiff told her that the tile and the rubber carpet were wet;

29.4.4. the plaintiff showed her with her hand that the tile and the rubber carpet were wet.

[30]. The plaintiff accepted that:

30.1 her opinion as to what the defendant should have done to avoid the incident (such as the rubber carpet covering the entire ramp) and her opinion that the ramp was an inherently dangerous area is based on her experience and not expertise; and

30.2 she is not an engineer and her opinion is thus not expert evidence.

[31]. The plaintiff closed its case without calling further witnesses.

THE DEFENDANT'S CASE

[32]. The defendant's first witness, Ms C. Matseke, testified that she is employed by the defendant as a hostess. Her duties entail serving customers and ensuring that the restaurant and its facilities are clean. It is her responsibility to walk around the restaurant at regular intervals and clean up any mess or spillages that she finds and generally ensure that the restaurant is neat and clean. She referred to this as her travel path. When the restaurant is busy she has to go about her travel path every fifteen minutes to ensure that all is in order and there are no spillages amongst other things. When the restaurant is not busy she has to go about her travel path every 30 minutes.

[33]. She was on duty on 10 June 2019 and remembers seeing the plaintiff come into the restaurant with her husband and two children. She remembers them placing a food order and before she could serve the food (with the assistance of another employee) she saw the plaintiff leave the restaurant through the ramp exit to smoke. At some point the plaintiff returned, she took the food order to the plaintiff's table accompanied by the other employee.

[34]. Thereafter, she went about her travel path, starting in the bathroom and eventually made her way outside, by the ramp. She recalls seeing a sticky spot on the rubber carpet and went to get a mop and a 'wet floor' sign. She wrung the mop so that it was damp, but not wet, and cleaned the sticky spot on the rubber carpet. She pointed out with reference to the video footage that the side where she cleaned the sticky spot was the opposite side to where the plaintiff fell. She waited approximately 5 minutes, checked that that spot was dry and checked the rest of the carpet and the tiled ramp for any

other concerns such as spillages. She could not detect any and once she had satisfied herself that the sticky spot that she cleaned was dry, she removed the 'wet floor' sign and went back into the restaurant. Since it was not a busy period, she was going to do her travel path again in another 30 minutes interval.

[35]. Approximately 10 to 15 minutes later (after she had returned from cleaning the sticky spot on the rubber carpet) while she was in the restaurant, school children ran into the restaurant and informed her that someone had fallen outside. She immediately went outside to see what had happened and to offer assistance. When she got outside, she saw the plaintiff on the ground at the end of the ramp. The plaintiff could not get up and was angry and in pain and said to Ms Matseke "do

I look ok?”. She told Ms Matseke to call her family who was still inside which Ms Matseke did and also went to report the

incident to her manager.

[36]. She ultimately reported the matter to Rosemary Ncube, the restaurant manager and another manager ‘Tumelo’. Thereafter she accompanied Ms Ncube outside, but when they got there the plaintiff was already gone. Herself and Ms Ncube checked the ramp to see what may have caused the plaintiff to fall but could not find any wet spots or any such other possible thing.

[37]. Under cross examination she testified that:

37.1 the tile is not a slippery tile and that it is rough;

37.2 the area where the incident took place is the defendant’s responsibility and as the defendant’s employee it is her responsibility;

37.3 In response to a contention that the area was wet, she testified that the area was not wet because she ascertained that the area was not wet when she attended to the sticky spot on the rubber carpet. She can see something that is wet and something that is not even if it is clear liquid on the floor;

37.4 she accepted that the tiles would be slippery when wet but disputed that the ramp (both the tiles and the rubber carpet) was wet.

37.5 the rubber mat has grip;

37.6 the defendant has written policies and it was put to her that these policies were not discovered by the defendant; and

37.7 the disclaimer notice is clearly visible from the tarred road;

37.8. the rubber carpet, when wet, will not be slippery given that there is more grip on the carpet and that it was expected that a customer’s

feet will grip the carpet;

37.9 she conceded that when a tile is mopped, it will create a dangerous situation, hence one will have to place a wet floor sign thereat. She conceded that to ascertain the surface’s dryness she does not use physically touch the floor before or after moping same, except to just make sure that the surface is dry.

37.10 it was put to Ms Matseke that there was only one child that accompanied the plaintiff and her husband, not two children as testified by her.

[38]. Ms Matseke disputed that:

38.1. the ramp area is inherently dangerous;

38.2 the plaintiff would not have fallen if the rubber carpet covered the entire ramp.

[39]. The plaintiff did not challenge Ms Matseke's evidence that:

39.1 she saw the plaintiff exit the restaurant before the food arrived;

39.2 the plaintiff entered the restaurant twice before the incident occurred;

39.3 whilst doing her travel path she noticed a sticky point/ stain on the rubber carpet which she cleaned with a mop which she had wring-dried. That sticky spot was on the opposite side of where the plaintiff slipped approximately 10 to 15 minutes before the incident occurred;

39.4 having wiped off the stain and gone back inside the shop to place the mop, she then went back to that cleaned spot (where she left the 'wet floor' sign) after five minutes to ascertain whether it was dry and realized that it was dry. At that stage she removed the wet floor sign. That was five minutes before the incident.

39.5 she had checked the ramp for any further spillages or dirty spots approximately 10 to 15 minutes before the incident occurred;

39.6 the restaurant was not busy and as such she was going to go about her travel path in 30 minutes;

39.7 the plaintiff did not show or tell her that the tile and the rubber carpet were wet;

39.8 she did not put up a 'wet floor' sign after the incident occurred;

39.9 the tiles and the rubber carpet were not wet when her and Ms Ncube checked the area after the plaintiff had left;

39.10 the tiles are rough and are not slippery; and

39.11 the disclaimer notice is visible from the tarred road.

[40]. On the basis of the above the defendant argues that in the circumstances, this evidence is uncontested and must be accepted by the court.

[41]. The defendant's second and final witness was Ms Rosemary Ncube who testified that she is employed by the defendant as the restaurant manager. Her duties entail amongst others training staff on the Station Observation

Checklist (SOC). The SOC is a checklist of the procedures that must be followed to ensure safety and security. One such procedure is the travel path. The travel path is undertaken by the hostess on duty to do routine checks of the restaurant to ensure that all is in order and to clean up where and when necessary. When the restaurant is busy, the travel path is undertaken every 15 minutes and when the restaurant is not busy, the travel path is undertaken every 30 minutes.

[42]. On 10 June 2019 she was on duty doing administrative work given that it was a Monday. Whilst in the office, it was reported to her that a customer had fallen outside. She went outside to check what had happened because as the restaurant manager she is responsible for filling out an incident form for any incidents that occur on the premises. When she arrived outside, the customer had already left but she saw school children outside and asked them what happened and they told her that a customer had fallen.

[43]. She checked the ramp to see what could have caused the plaintiff to fall because there had never been such an incident. She looked to see if the tiles and rubber carpet were wet but found nothing.

[44]. On 19 June 2019 she received a request from McDonald's customer care for a video footage of the incident that occurred on 10 June

2019. She then saved the six second video footage.

[45]. Under cross examination, the plaintiff did not challenge Ms Ncube's version that:

45.1 in terms of the defendant's SOC and for quality assurance and safety purposes, the travel path is undertaken every 15 or 30 minutes depending on how busy the restaurant is;

45.2 after the incident occurred she went to the area where the incident occurred to see what may have caused the plaintiff to fall; and

45.3 she could not find any wet areas on the tiles or the rubber carpet.

[46]. Under cross-examination and in regard to the defendant's policies referred to by Ms Matseke in her evidence, Ms Ncube testified that Ms Matseke misunderstood the said policies. (This led to the plaintiff arguing that Ms Ncube's response can only mean that Ms Ncube was listening to Ms Matseke as she testified).

[47]. In light of the above, the defendant argues that the above evidence is uncontested and must be accepted by the court.

LEGAL PRINCIPLES / ANALYSIS

[48]. The actio legis Aquiliae enables a plaintiff to recover patrimonial loss suffered through wrongful and negligent act or omission of the defendant. Liability depends on the wrongfulness of the act or omission of the defendant. Although conceptually the enquiry into wrongfulness is anterior into the inquiry of negligence, however, without negligence, the issue of wrongfulness does not arise.

[49]. In regard to the principles of drawing inferences, in *Caswell v Powell Duffryn Collieries Ltd* [1939] 3 ALL ER 722 (HL) at 733E-F (and adopted by our courts in *S v Mtsweni* 1985

(1) SA 590 (A), the court distinguished between inference and conjecture or speculation in that:

“Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proven facts from which an inference can be made, the method of inference fails and what is left is mere speculation or conjecture.”

[50]. Still on inference principles, in *Skilya Property Investments (Pty) Ltd v Lloyds of London* 2002

(3) SA 765 (T) at 781A-B, it was pointed out that:

“The inference sought to be drawn must comply with the first rule of logic stated in R v Blom 1939 AD 188 at 202-3:

‘(1). The inference sought to be drawn must be consistent with all the proven facts. If it is not, the inference cannot be drawn.’”

and, further at 781B-D that:

“Where more than one inference is possible on the objective proven facts, the court may by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one. And in this context, ‘plausible’ has the connotation of ‘acceptable, credible, suitable.’”

[51]. In regard to the assessment of witnesses and resolution of mutually destructive versions, including the general probabilities, it was stated in *National Employer’s General Insurance v Jagers* 1984

(4) SA 437 € at 440D-G that:

“It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case, the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the court will weigh up and test the plaintiff’s allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff’s case any more than they do the defendant’s, the plaintiff can only succeed if the court nevertheless believe him and is satisfied that his evidence is true and that the defendant’s version is false. “

[52]. Arguing in regard to the defendant's negligence, the plaintiff relied on *Brauns v Shoprite Checkers (Pty) Ltd* 2004

(6) SA 211 (E) 217- I, where it was stated that:

"Like anybody else who walks in a walkway where the general public not only has access but indeed is invited to enter and walk on it, the plaintiff was entitled to expect that she could walk on it with safety."

[53]. On the question of what can reasonably be expected of the plaintiff under circumstances of this nature, it was stated in *Probst v Pick n Pay Retailers (Pty) Ltd* [1998] 2 All SA 186 (W) 194 that:

"The reasonable man in a supermarket is not expected to be looking down at the ground at every step he takes. He is entitled, generally

speaking, to accept that the floor is kept clean and in a safe condition."

[54]. Section 49(3) of the CPA provides that a provision, condition or notice must be written in plain language.

[55]. Section 49(4) of the CPA reads:

"The fact, nature and effect of the provision or notice contemplated in sub-section (1) must be drawn to the attention of the consumer –

(a) In a conspicuous manner and form that is likely to attract the attention of an ordinarily alert consumer, having regard to the circumstances,

and

(b) Before the earlier of the time at which the consumer –

(i) enters into the transaction or agreement, begins to engage in the activity, or enters or gains access to the facility...."

[56]. Section 49(5) reads:

"The consumer must be given an adequate opportunity in the circumstances to receive and comprehend the provision or notice as contemplated in subsection (1)."

[57] In *Durban's Water Wonderland (Pty) v Botha and Another* 1991 (1) SA 982 (SCA) at 991C, the Supreme Court of Appeal dealt with the inquiry to be undertaken whether the defendant was reasonably entitled to assume from the plaintiff's conduct in proceeding to enter the premises that he or she assented to the terms of the disclaimer or was prepared to be bound by them without them. Scott JA stated that:

". . . [the] answer depends upon whether in all the circumstances the [defendant] did what was "reasonably sufficient" to give patrons notice of the terms of the disclaimer. The phrase "reasonably sufficient" was used by Innes CJ in Central South African Railways v McLaren 1903 TS 727 at 735. Since then various phrases having different shades of meaning have from time to time been employed to

describe the standard required. (See King's Car Hire (Pty) Ltd v Wakeling 1970 (4) SA 640 (N) at 643G-644A.) It is unnecessary to consider them. In substance they were all intended to convey the same thing, viz an objective test based on reasonableness of the steps taken by the proferens to bring the terms in question to the attention of the customer or patron."

[58]. In *Stearns v Robispec (Pty) Ltd* 2020 JDR 0363 (GJ) the Court held that notwithstanding that the notices were prominently displayed it was not satisfied that the steps taken to bring the disclaimer to the attention of the customers were reasonable, in the present matter, the steps were reasonable. The facts were that the disclaimer notice was contained under the headings 'Right of admission reserved' and 'Trading hours'. There was no separate heading for the disclaimer. The Court found that the disclaimer is not distinguished by a heading which would draw attention to it and its script is also the same smaller print as the rest of the notice advising the public of the stores trading hours and the further information it contains.

[59]. In *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 493 (SCA) par. 18, the SCA in setting out the proper approach for interpreting legal texts, including legislation and contracts, stated the following:

"Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation."

[60]. Where there are conflicting versions the Court should consider the probabilities of the matter. As stated in *National Employers' General Insurance Co Ltd v Jagers* 1984

(4) SA 437 (E), the Court stated:

"In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff

as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the

plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false”.

[61]. In respect of the so-called ‘slipper-shop-floor cases’ the following general rule applies, as was held in *Probst v Pick n Pay Retailers (Pty) Ltd* 1998 2 All SA 186 (W):

“The duty on the keeper of a 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”.

SUBMISSIONS

ON BEHALF OF THE PLAINTIFF

[62]. It was submitted that under cross-examination that Ms Matseke did not deny the plaintiff's version that the plaintiff was in fact in the company of one child and not two as alleged by Ms. Matseke. Regarding Ms Matseke's allegation about her going back to the wiped off area five minutes thereafter and removing the wet floor sign on realising that the area was already dry, the argument on behalf of the plaintiff was that this version was not put to the plaintiff under cross-examination. In regard to the question who exactly Ms. Matseke reported the incident to, the plaintiff further raised inconsistencies in Ms Matseke's evidence given her first mentioning the name Tumelo as being such a person in Tumelo's capacity as the (then) shift manager who in turn had to report it to the restaurant manager, thereafter testifying that it was to the current namely, Mam Rose (“Ms Rosemary Ncube”).

[63]. In regard to Ms Ncube's evidence in the video footage, the plaintiff laments the fact that same was availed to the plaintiff almost two years after the date of the incident at the plaintiff's attorneys' instance. Re the incident report, the plaintiff also laments the fact that same was never discovered despite the request by the plaintiff. Although the plaintiff submits that an act of hearing another witness's testimony will not in itself disqualify such a witness, the plaintiff however argued that Ms. Ncube was prepared to lie in tendering her evidence, it having become apparent, as argued further by the plaintiff and despite Ms Ncube's, that she had been listening to Ms Matseke's evidence. It was argued further that Ms Ncube was not a credible witness.

[64]. In regard to Ms Matseke's credibility, the plaintiff submitted that she was an unreliable witness on the premise that her version allegedly did not accord with the one put to the plaintiff on her behalf. It was further argued that the court should approach her evidence with caution in light of her evidence that she executed her duties to the tee and with fear of the possible disciplinary processes that may follow were she to commit a mistake or do anything to the contrary. It was further argued that she was not forthright as to where exactly she mopped and also the extent of the wetness of her mop when she was cleaning the sticky area of the stain on the carpet. It was further submitted that she gave contradictory versions as regards the manner in which she reported the incident and on the evidence regarding the allegation that a wet floor sign was placed and also removed shortly thereafter. It was further argued that it is evident that

Ms Matseke's evidence was intended to demonstrate

to her superior Ms Ncube that she was a good employee. It was further argued that Ms Matseke was defensive and aligned her evidence with her own self-interest.

[65]. The plaintiff argued that Ms Ncube's evidence should be rejected as she lacked credibility. The basis thereof was that Ms Ncube has committed perjury given that when first asked whether she watched the evidence of Ms Matseke, she denied same but on realizing the repercussions that could arise she then made an about turn stating that she did not.

[66]. In what the plaintiff calls drawing of inferences, she concedes that there is no direct evidence on the issue whether the specific spot on which the plaintiff stepped was wet, save for the fact that the plaintiff testified that she did indeed touch the rubber carpet and the tile and felt that they were wet. The plaintiff further submits that there is direct evidence that shortly prior to the fall the defendant mopped in the general area. The plaintiff argues against what she calls the defendant's narrow argument that because the plaintiff did not touch the exact spot on which she slipped, those specific tiles were not wet, submitting that by so arguing, the defendant loses sight of the broader context of the incident.

[67]. The plaintiff submits that the objective fact in this matter is that shortly before the plaintiff slipped and fell, Ms Matseke had mopped that area and the plaintiff's evidence that the area was wet. Citing *Caswell and Skilya Property Investments* below, the plaintiff argues the inference can be drawn 'with almost practical certainty' that the floor was wet, alternatively and on probabilities, that it is plausible that the spot where the plaintiff stepped was indeed wet and it is what caused her to slip.

[68]. In regard to the assessment of witness and mutually destructive and/or irreconcilable versions, the plaintiff submits that in casu the only irreconcilable version is the area where Ms Matseke mopped and the evidence that she placed a wet floor sign in the area after the floor. The plaintiff further submits that from an objective perspective Ms Matseke was not a credible witness.

[69]. As regard the negligence issue on the part of the defendant, the plaintiff submits that given the defendant's witnesses concession that the purpose of the rubber carpet was to assist customers to grip when walking up and down the ramp area, it must be accepted that a reasonable restaurant in the position of the defendant would have foreseen the reasonable possibility that a failure to place a rubber carpet to cover the whole ramp area may injure a customer. It was further argued that a reasonable restaurant in the position of the defendant would have foreseen the reasonable possibility that a wet tile may cause a dangerous situation, as conceded to by Ms Matseke under cross-examination. The plaintiff further argued that the defendant's argument that a specific type of a shoe contributed to causing the incident was without any evidentiary foundation.

[70]. In regard to the determination of negligence on the part of the defendant, the plaintiff submitted that two considerations have to be made, namely:

1. the smooth ramp area; and
2. the smooth wet ramp area.

[71]. In regard to the above two considerations, the plaintiff argued that a diligens paterfamilias in the position of the defendant would have foreseen and guarded against such a reasonable possibility of the plaintiff slipping and falling on the smooth ramp area and/or smooth wet ramp area. Relying on what was stated in Brauns above, the plaintiff argued that like anybody else who walks in a walkway where the general public not only has access but indeed is invited to enter and walk on it, the plaintiff was entitled to expect that she could walk on it with safety.”

[72]. As relates to the smoother ramp area, the plaintiff argues that the defendant, despite having had the foresight of the potential danger thereto, it regardless went ahead and provided this specific MacDonalds branch with a rubber carpet which does not cover the entire sloped area (the rubber carpet being 34.5 cm short). Quoting Probst above, the plaintiff argues that given the distance between the rubber carpet and the road, which coincides with the point at which a reasonable customer would be focusing on possible motor vehicles, the law is clear that it cannot be expected of a customer to be looking down at her feet. Accordingly, the plaintiff argues that the plaintiff was negligent in this regard.

[73]. In regard to the issue regarding the smoother wet ramp area, the plaintiff argues that the defendant was also negligent in light of Ms Matseke’s evidence that there is no policy for its employees to ensure that an area which was wet prior to and /or mopping after is in fact dry as she does not have to touch the floor physically other than to make sure that it is dry. The plaintiff further argued that even Ms Matseke’s single act of removing the wet floor sign before the wet tiles were in fact dry in itself created a dangerous situation

[74]. Relying on the relative approach to negligence guideline as was stated by the Supreme Court of Appeal (“SCA”) in *The Premier of the Western Cape Province v Loots* (214/2010)

[2011] ZASCA 32 par [13], the plaintiff submitted that what is required is that the general nature of the harm that occurred and the general manner in which it occurred was reasonably foreseeable.

[75]. In respect of wrongfulness, the parties are ad idem that the defendant has a legal duty to ensure safety of its customers. In regard to the test for the existence of such a legal

duty and relying on *Van Eeden v Minister of Safety and Security (Women’s Legal Centre Trust as amicus curiae)* 2003

- (1) SA 389 (SCA) 395-396, the plaintiff argues that the defendant had a duty to appropriately warn the plaintiff of the nature of the hazard and the risk involved which existed on the ramp area has acted wrongfully given that he was in control over the ramp area. The plaintiff submitted therefore that the same failures underpinning the negligent act of the defendant is equally applicable in its failure to comply with its legal duty of care. She argued that the defendant acted wrongfully by creating the source of danger (that is shorter rubber

carpet) and by commission (the wet surface and removing and/or not placing the wet floor sign at the affected area.

[76]. In regard to the disclaimer notice raised by the defendant as its defence, the plaintiff argues that the wording of same is ambiguous and does not include the ramp area. Relying on First National Bank of SaA Ltd v Rosenblum and Another 2001

- (4) SA 189 (SCA) par [6], the plaintiff further argues that it is trite that a party wishing to contract out of liability must do so in clear and unequivocal terms which are clearly visible. The plaintiff further submits that the disclaimer notice does not comply with subsections 3 to 5 of section 49 of the CPA, arguing, inter alia, that a standing in the parking area will also not be able to read and comprehend the notice. The plaintiff further argues that the moment a customer steps on the ramp area, the customer has started to engage in the activity and/or gained access to the facility which will trigger the policy considerations for this court to make an order in terms of section 52(4)(a)(i) declaring that it has no force or effect (only if this court makes a finding that the notice was clear and in plain language. The plaintiff argues further that under the circumstances defendant failed to provide the plaintiff with an opportunity to receive and comprehend the notice, arguing further that neither is the notice written in plain language to define the nature of the risk and the area which area covered.

[77]. Lastly the plaintiff argues that she has proved her claim on the merits and that in the result the defendant be held liable for damages to be proved by the plaintiff sustained on 10 June 2019 at McDonald's Wingtip situated at Wingtip Crossing Shopping Centre and that the defendant be further ordered to pay the costs of the merits trial.

SUBMISSIONS

ON BEHALF OF THE DEFENDANT

[78]. In regard to the plaintiff's evidence that she could not recall whether she saw the disclaimer notice or not, the defendant submits that the plaintiff's evidence should be rejected by the court, especially in light of Ms Matseke's evidence which accorded

with the court's observation that both the disclaimer and the caution notices are noticeable from the tarred road. The defendant

argues that the notice is quite conspicuous and would have come to the plaintiff's attention .

[79]. The defendant contends further that the notices, in particular the disclaimer notice complies with the provisions of section 49(3) to (5) of the CPA, in that:

79.1 The notice is written in plain language;

79.2 The fact, nature and effect of the notice is drawn to the attention of the consumer:

79.2.1 in a conspicuous manner and form that is likely to attract the attention of an ordinary alert consumer, having regard to the circumstances; and

79.2.2. before the plaintiff enters or gains access to the facility and in particular, where the incident occurred.

79.3 The plaintiff had adequate opportunity in the circumstances to receive and comprehend the provision of the notice. This is so especially in light of Ms Matseke's uncontested evidence that the plaintiff entered the premises twice, using the same entrance. The plaintiff had two opportunities to receive and comprehend the provision of the notice before the incident occurred.

[80]. The defendant submits that it is evident from the photos of the disclaimer notice and the caution notice (as well as the court's observations) that the notices were prominently displayed and that the steps taken by the defendant to bring the notice to the attention of the plaintiff were reasonable. The defendant further submits that the facts in casu are distinguishable from Stearns above, arguing that in casu, the disclaimer notice is a self-standing notice with a clear 'Disclaimer of Liability' heading. The disclaimer notice is bigger than all the other notices on the door. The notices are in red whereas the rest of the immediate surroundings are dark grey thus clearly drawing attention to the notice. On this basis the defendant further argues that the defendant took reasonable steps to draw the plaintiff's attention to the notice. This being so, the defendant was reasonably entitled to assume from the plaintiff's conduct in proceeding into the store that she consented to the terms of the disclaimer or was prepared to be bound by them without reading them.

[81]. In regard to the ambiguity of the disclaimer notice claim by the plaintiff and her contention that it thus does not exclude liability for damages suffered where the incident occurred, the defendant contends that it is unclear in which respects the plaintiff contends that the notice is ambiguous as the notice is not ambiguous but is in plain language and capital letters. The defendant further argues that to the extent that the ambiguity may relate to the plaintiff's contention that the notice does not exclude liability for damages sustained in the area where the incident occurred (the ramp area), this contention is absurd and just a matter of interpretation. The defendant argues that to suggest that the notice does not cover

the entrance area would lead to insensible and unbusinesslike results and undermine the purpose of the disclaimer notice.

[82]. The defendant further argues that the question whether or not the disclaimer covers the ramp area can only be relevant to the plaintiff's rebuttal of the disclaimer defence if her contention was that she saw the disclaimer, did not consider it applicable to the ramp and thus proceeded into the restaurant in the knowledge that she was not waiving liability for anything that happened on the ramp. This was not her case, the defendant contends. The defendant further submits given that the notice makes it clear that it refers to the restaurant, its facilities, including drive through and parking areas and specifically states 'whilst on the premises', and that once it is accepted that the ramp is on the defendant's premises, as contended for by the plaintiff, then it must follow and be accepted that the disclaimer notice applies to the ramp.

[83]. The defendant thus submitted that in the final analysis the disclaimer is applicable, the defendant is absolved of any liability and the plaintiff's claim should be dismissed with costs.

[84]. In regard to the conflicting versions and probabilities, including the plaintiff's onus, the defendant referred to Jagers above, the defendant submits that in order for the plaintiff to succeed in her claim, the court must be satisfied that the plaintiff's version is true and the defendant's version is false. The defendant thus argues that having regard to the defendant's evidence (especially the uncontested evidence of the defendant's witnesses), the general probabilities and the credibility of the witnesses, the court cannot find for the plaintiff.

[85]. In any event, on the plaintiff's own version, the defendant contends, she cannot say definitively that the spot where she slipped and fell was wet. It is an assumption that she made based on her having felt the opposite side of where she fell which she says was wet. However, the evidence of Ms Matseke that she checked the area approximately 10 to 15 minutes before the incident occurred and it was not wet was not challenged neither was the evidence of both Ms Matseke and Ms Ncube that after the incident they checked the area and it was not wet. The defendant submits that Ms Matseke was an honest and credible witness, despite plaintiff's counsel's baseless proposition that she carried her duties correctly lest she be in trouble. It was further contended that Ms Matseke's incorrect recollection of how many children accompanied the plaintiff into the restaurant is not sufficient to hold that her evidence is not satisfactory in every respect given the immateriality of the actual number of children in the plaintiff's company at the relevant time.

[86]. In regard to the plaintiff's counsel's attempt to challenge Ms Ncube's credibility by suggesting that she had listened to Ms Matseke's evidence and thus was aware of what questions would be asked of her under cross examination, the defendant argues that there is simply no basis for this proposition. Ms Ncube was similarly a frank and honest witness and there is no basis to find that the defendant's witnesses are not credible.

[87]. The defendant submits that both its witnesses are credible. Material aspects of their evidence was not challenged, especially in relation to whether or not the area was wet at the time when the plaintiff fell. Unlike the plaintiff's version, the defendant's remained consistent throughout. On the other hand, the plaintiff changed her version during cross examination, so much so that it necessitated an amendment of her particulars of claim. However, this amendment does not resolve the contradictions in the plaintiff's version.

[88]. In light of the above submission, the Court cannot find that the defendant's version is false. To make such a finding the court must find that Ms Matseke and Ms Ncube are not credible witnesses and that their evidence is false. In the circumstances, the court must find that the plaintiff has not discharged her onus and her claim should be dismissed with costs.

[89]. In regard to the issue of wrongfulness, the defendant submits that it is common cause that the defendant admitted that it owed the plaintiff a general duty of care, as a visitor of the defendant's premises and to take all reasonable steps to ensure that the defendant's premises was generally safe.

[90] Thus, the onus is on the plaintiff to prove that the defendant failed to comply with this duty. The defendant argues that the plaintiff has failed to discharge this onus and therefore submits that the evidence shows that the defendant took all reasonable steps to ensure that its premises was generally safe.

[91]. In the above-stated circumstances, the defendant contends that the plaintiff has failed to establish wrongfulness and her claim must be dismissed with costs.

[92]. In regard to the issue of negligence and relying on Probst above, the defendant submits that ultimately and to the extent that this court finds that there was a wet spot where the plaintiff

fell and that the plaintiff slipped and fell because of that wet spot, the next issue for determination by this court would be whether the defendant took reasonable steps to prevent the incident from occurring, that is, did the defendant have reasonable measures in place to detect the spillage. The defendant submits the evidence of the reasonable steps taken by the defendant to detect spillages is uncontested and must be accepted by this court. When it was put to Ms Matseke under cross examination that she may not have been able to detect the wet spot because she may not have been able to see the wet spot on the tile, she testified that given her experience, she was able to detect a spillage because it was her job. This, the defendant argues, was not challenged, nor was it ever put to her or any of the defendant's witnesses that to check the area every 30 minutes for spillages is not reasonable. The defendant submits that the question is whether or not the defendant's system in place to detect and deal with spillages is reasonable. The defendant submits that the defendant's system is reasonable and adequate. The plaintiff has not proven otherwise.

[93]. To buttress the above argument, the defendant cites Brauns above where it was established that the water on the floor 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. The defendant argues therefore that Brauns is clearly distinguishable from the facts in the present matter, and demonstrate that the defendant's system, which was not challenged by the plaintiff, is reasonable.

[94]. The defendant further argues that in the event that this court finds that the area where the plaintiff fell was wet (which the defendant denies), the defendant submits that the plaintiff has failed to establish the second leg of the negligence inquiry, that is, the plaintiff has failed to establish that the defendant failed to take such steps that a reasonable person would have taken to guard against the incident occurring.

[95]. The plaintiff contends that the defendant was negligent in that it failed to ensure that the rubber carpet covered the entire area. The contention appears to be that if the entire area was covered with the rubber carpet, the incident would not have occurred. With respect, this argument is pure speculation and in order to establish this, the plaintiff would have had to lead expert evidence to this effect. The mere fact that the texture of the tile and the rubber carpet differ does not, without more, mean that extending the rubber carpet to cover the entire area would have prevented the incident or even more so that a reasonable person in the position of the defendant would have taken this step. The opinion evidence of a lay person is inadmissible. The defendant contends that this court cannot without expert evidence find that the ramp is inherently dangerous, especially in light of the defendant's evidence that this was the first incident that had occurred. What makes it inherently dangerous? The steepness of the ramp? The texture of the tile? The rubber carpet not covering the entire area? None of these questions can be answered without expert evidence. On this basis the defendant submitted that the plaintiff has failed to discharge the requisite onus, arguing that her claim should be dismissed with costs.

ANALYSIS

[96]. It is common cause that on 10 June 2019 the plaintiff fell at the entrance of the defendant's premises. The plaintiff's case is, inter alia, that but for the defendant's failure to exercise due care and proper control of its premises, the incident and the plaintiff's

subsequent damages would not have occurred. Amongst the failures the defendant allegedly committed, the following are stated by the plaintiff:

96.1 The defendant failed to:

96.1. Ensure that the rubber mat covers the entire ramp area;

96.2 Place a "wet floor" sign at the area on the ramp where the incident took place; and

96.3. Keep the ramp area dry.

[97]. In regard to the issue of negligence, it is common cause that the test for negligence is a two-stage inquiry. Liability will arise if:

97.1 a reasonable person in the position of the defendant:

97.2.1 would foresee the reasonable possibility of its conduct injuring another person and causing patrimonial loss; and

97.2.2 would take reasonable steps to guard against such occurrence.

97.2 the defendant failed to take such steps.

[98]. Although the defendant makes two admissions, namely, (1) that it owed the plaintiff the general duty of care to take all reasonable steps in ensuring that its premises were generally safe; and (2) that the plaintiff indeed fell on the ramp at the entrance of its premises, it however contends that it complied with the duty of care it owed to the plaintiff. It further denies that the rubber carpet and the spot at which the plaintiff fell was wet.

[99]. In regard to the issues for determination, the plaintiff submits that this court first determines the issue of negligence and thereafter wrongfulness where the focus will be on the disclaimer notice, with the onus being on the plaintiff to establish the contended relevant facts.

[100]. From the evidence, the following arise as issues for determination:

1. whether the defendant is absolved of liability by virtue of the disclaimer notice;
2. whether the spot where the plaintiff fell was wet; and
3. if that spot was wet, whether the defendant failed in its duty to the plaintiff by negligently breaching the legal duty of care it owed to the plaintiff on the grounds alleged by the plaintiff.

[101]. In regard to the issue of the disclaimer, the plaintiff relies on the above-cited provisions of the CPA, arguing that this court can therefore not find the disclaimer notice to be applicable and enforceable given that it comes short of the requirements of subsection 3 of section 49 of the CPA in that the disclaimer notice is ambiguous. The defendant argues that the disclaimer notice is written in plain language and could not be more clearer and relies on *Endumeni* above for purposes of the court's approach on matters of interpretation.

[102]. For completeness' sake it is noteworthy that mention be made at this stage of the more pertinent observations made at the inspection in loco conducted on 3 August 2022:

102.1. The disclaimer notice, including the red-colored boards below it, are noticeable from a distance of about 6.7 meters, which is the point where the pedestrian crossing starts by the bottom edge of the tiled ramp area;

102.2 The contents of the disclaimer notice are readable from the point where the ramp area starts (from the tarred road); and

102.3. The caution notice with words: 'floors may be slippery (with a picture of person slipping)', with its size being 19cm width and 11.52 cm height is also readable from the point where the ramp area starts (from the tarred road).

[103]. Having considered both the disclaimer notice and section 49 of the CPA and relevant subsections applicable herein, including the observations made at the inspection in loco, I find that on the balance of the evidence before me, there is nothing controvertible about the disclaimer notice's wording, including the instance at which it is brought to the attention of the plaintiff in casu, distance-wise, as per the inspection in loco observations made. There is no ambiguity in the language used therein given that the language used is quite plain. What I find

untenable is the plaintiff's argument that the tiled ramp being the area where the incident occurred is not subject to the defendant's liability exclusion as stated in the disclaimer notice since no mention of the ramp area is categorically made unlike other areas such as the parking area. However, what the plaintiff could not argue away is the fact that in her pleaded case and her evidence, the ramp area forms an integral part of the defendant's premises.

[104]. Bearing in mind the above argument by the plaintiff, sight can therefore not be lost of the fact that the impugned disclaimer notice specifically includes the words all persons 'entering Mcdonald's.....' (my emphasis). In my view and in accord with the plaintiff's case, the ramp can never be viewed otherwise than indeed forming an integral part of the defendant's premises. It is on this basis that I am satisfied that the submission by the plaintiff that the ramp is exempt from the disclaimer notice is unsustainable. It is my considered view that this court's interpretation as to the contents of the disclaimer notice is in harmony with the approach envisaged in *Endumeni* above. As already stated above and contrary to the plaintiff's contention, the contents of the disclaimer notice do not contravene any relevant subsection of section 49 of the CPA. This court makes the above findings despite the plaintiff's testimony that she could not remember if she did take notice of the disclaimer notice on entering the premises. In my view, just on the basis of this evidence, it becomes inexplicable how the plaintiff would still want to appropriate and avail to herself any possible relief that may flow from any issue arising from the disclaimer notice, given that it is her own version that she never had any regard whatsoever to the disclaimer notice. My above view on this notwithstanding, I am satisfied that the disclaimer notice stands to be applicable and enforceable when the conspectus of evidence is considered.

[105]. In regard to the alleged failures by the defendant, namely; failure to ensure that the rubber mat covers the entire ramp area; failure to place "floor is wet" sign at the area on the ramp where the incident took place; and failure to keep the ramp area dry, the following is common cause: the versions by both parties are mutually destructive and the trite approach of relying on, *inter alia*, probabilities becomes pertinent. Foremost, despite the plaintiff's argument that the defendant's failure to ensure the rubber carpet covers the entire ramp area is what caused the incident, she however proffered no evidence to substantiate that view, other than her own speculation. I find the plaintiff's suggestion that the tiled area's slipperiness could have been avoided but for the bottom part of the ramp not having been entirely covered by the rubber carpet to be a bit of an overreach. For one thing, the plaintiff does not lay any basis for such a submission other than to say that the rubber carpet assists customers with a grip on the slopy ramp area. This proposition cannot be sufficient for purposes of discharging the plaintiff's onus on the balance of probabilities. What cannot be gainsaid is that indeed the ramp tiled area is smoother relative to the rubber carpet but this fact in itself does not justify the arrival to the plaintiff's above articulated conclusion.

[106]. In regard to the question whether the spot at which the plaintiff fell was wet, it is an issue both parties disagree on. Whereas in her evidence the plaintiff testified that whilst lying on the ground following her fall, she felt with her hand that the tiled area and the rubber carpet at top part by where she fell were wet, the information which she then relayed to Ms Matseke (it can be

safely assumed) and to which the latter responded by placing a wet floor sign thereat. Ms Matseke denies ever having such a conversation with the plaintiff nor ever placing the wet floor sign as the plaintiff alleges. Instead, Ms Matseke's evidence is that whilst in the company of Ms Ncube and on inspecting the ramp area for any possible

spillage at the time the plaintiff had already left the premises, no wetness was ever detected, be it on the rubber carpet or the tiled area. When this evidence is tied to Ms Matseke's that she did her travel path just before the incident when she cleaned the stained spot on the carpet using a mop she had wringed-dried and that the area was dry when she finally removed the wet floor sign which she had momentarily placed thereat, I cannot arrive at any conclusion than that indeed that area was dry.

[107]. Furthermore, as relates to the plaintiff's submission that doubt and uncertainty in regard to the dryness of the cleaned stained spot on the rubber carpet still exists given Ms Matseke's evidence that she doesn't ascertain dryness by touching the tiled ramp other than by just a simply looking, I find same unsustainable. I am persuaded by Ms Matseke's explanation that her experience as a cleaner, to put it loosely, enables her to merely look at that surface and be able to make that determination whether or not the area is dry. In my further view, there is no basis whatsoever for the plaintiff to suggest that Ms Matseke's evidence was being tailor-made to protect her against any possible repercussions by her employer since she had testified that she always ensures that she is thorough with the performance of her duties to avoid being hauled before a disciplinary hearing, so to speak.

[108]. Still on the above issue, for the plaintiff to further suggest that Ms Matseke's testimony was meant to field off possible dire consequences from her employer is baseless, because from her evidence, all that she had to do on the day of the incident was to do her travel path every 30 minutes, and this she did. It therefore cannot be argued that she could have fallen foul with her employer or Ms Ncube, her manager, given that she had fulfilled what was duly expected of her, if her evidence is anything to go by. In this regard, I am inclined to accept Ms Matseke's evidence that the entire ramp area was dry. In the same breadth, I am equally satisfied that the plaintiff's evidence is, on probabilities, neither accurate nor true. I arrive at this conclusion because despite the plaintiff slipping on her feet, the basis of her assertion that the ramp was wet does not arise from what she saw, observed and/or felt at the area on which she fell, but rather from the top area by where

her upper body, including her hands, lay following her fall. In my view, such over-generalization about the unsubstantiated entire

condition of the ramp should be guarded against and therefore stand to be rejected. It is therefore my considered view that in regard to this aspect, the defendant did not fail in its duty to the plaintiff by negligently

breaching the legal duty of care it owed to the plaintiff on the grounds alleged by the plaintiff.

[109]. In regard to the issue of wrongfulness and negligence, it is trite that an omission is wrongful if the defendant is under a legal duty to act positively to prevent the harm suffered by the plaintiff and the defendant fails to comply with the duty. The test is one of reasonableness. In light of my finding that the disclaimer notice is applicable and enforceable, the plaintiff's claim must be dismissed with costs.

CONCLUSION

[110]. Having considered the conspectus of the facts before me, I am satisfied that the defendant has established that the disclaimer notice, which I find to be applicable and enforceable, absolves it of liability. The above finding notwithstanding, I am satisfied that the plaintiff has failed to discharge the onus of proving on a balance of probabilities that:

110.1 the defendant failed to comply with its legal duty of care owed to the plaintiff;

110.2 the tiled area of the ramp and the rubber carpet, for that matter,

where the plaintiff fell, was wet.

[111]. Furthermore, I am satisfied that in line with Probst, the defendant was not negligent in the manner in which it both checked, detected and cleaned the area prior to the incident and the time when the incident occurred.

[112]. In the result I am satisfied that the plaintiff has failed to prove her claim on a balance of probabilities whereas the defendant had discharged its burden, on probabilities, by proving that its disclaimer notice exempts it from any liability whatsoever towards

the plaintiff. Accordingly, the plaintiff's claim stands to be dismissed with costs given the trite default position for costs to follow the result. I am further satisfied that, despite contradictions which I find to be immaterial, both Ms Matseke and Ms Ncube were credible witnesses. Their evidence was accurate and their evidence stands to be accepted. However, as already stated above, same cannot be said of the plaintiff whose evidence stands to be rejected.

ORDER

[113]. The plaintiff's claim is dismissed with costs.

Livhuwani Vuma

Acting Judge

Gauteng Division, Pretoria

Closing Arguments Heard on: 18 August 2022

Judgment

delivered on: 14 November 2022

Appearances:

For Plaintiff:

Adv. H.P. Wessels

Instructed by:

Van Der Merwe & Associates Attorneys

For Defendant:

Adv. L. Segeels-Ncube

Instructed by:

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Prepared on 12 October 2026 · Esheria