

SOUTH AFRICA / JUDGMENT

## Moodley v Fashion World (2916/2016) [2020] ZAKZDHC 54 (22 October 2020)

[2020] ZAKZDHC 54

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Mngadi

CASE / FILE NUMBER

2916/2016

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### Source record

IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

LOCAL DIVISION, DURBAN

Case

No: 2916/2016

In

the matter between:

DENISE

MOODLEY

PLAINTIFF

and

FASHION

WORLD

DEFENDANT

ORDER

1.

Judgment on the issue of liability is granted in favour of the plaintiff.

2.

The defendant is ordered to pay costs.

**JUDGMENT**

Delivered on:

Mngadi, J

- [1] This is a delictual action, the liability part thereof, instituted by the plaintiff against the defendant. The plaintiff is Denise Moodley an adult female person. The defendant is Fashion World a business entity.
- [2] The plaintiff in the summons claims general damages for pain and suffering, discomfort and loss of enjoyment of amenities of life. Further, she claims past and future medical expenses and for loss of earnings. The quantum part of the claim is to be determined separately and a later stage.
- [3] In the particulars of claim, the plaintiff states that she and her colleague in the course of their work entered the defendant's retail outlet, which was open for business. She tripped on the remnants of tile grout or tile cement left on the floor where floor tiles had been removed causing the floor to be uneven. She fell and she sustained a fractured right foot. There were no warning signs displayed at the entrance to warn persons entering the shop of the danger.
- [4] The plaintiff as the basis for negligence states that the defendant through its employees allowed the area where she fell to constitute a danger to members of the public entering or leaving the premises. It failed to take any or adequate steps to prevent the danger occurring by failing to erect proper warnings, by leaving the dangerous area uncovered and or permitted it to be left uncovered.
- [5] The defendant in the plea admitted that the plaintiff entered its retail outlet. It admitted that it owed a legal duty to take reasonable steps to prevent harm or injuries to persons entering or leaving its retail outlet. It denied any negligence on its part. It averred that prior to members of the public entering the shop, the floor area accessible to the members of the public was swept and cleaned. The store was in the process of being renovated in that floor tiles were being laid. The area being tiled was cordoned off. It denied that the tiles at the entrance of the outlet were uneven.
- [6] The plaintiff in the hearing adduced evidence. She testified and she called one witness. The defendant called three witnesses, namely; its store manager and two employees.
- [7] The plaintiff testified that on 6 May 2015 at about 9H00 she together with her colleague Ms. Silindile Mtshali entered the defendant's retail outlet. They were distributing pamphlets and advising potential customers of the offers provided by their employer. That morning they had visited other businesses in the area and had met with members of the public. The security guard at the entrance approached them. He wanted to know the purpose of their visit. Her colleague who was next to her explained to the security guard the purpose of the visit and showed him the pamphlets. The security guard gave them permission to enter the

outlet.

- [8] The plaintiff testified that at the entrance there was an area of about 2mx1m in size, not covered with floor tiles. The tiles had been removed leaving hardened grout or cement remnants in the area. The area was at the entrance and one could not enter the shop without walking on the uncovered area. It covered most part of the entrance and therefore one could not walk around it. They were on that uncovered area when the security guard stopped them. Silindile was next to her on her side.
- [9] She testified that after the security guard allowed them to enter the shop she took a step forward. The foot stepped out of the uncovered area onto the tiled area which was at a slightly higher level. She tripped on the dry grout or cement remnants on the uncovered area and slipped falling onto her back. She could not stand up. Silindile was slightly in front of her when she slipped and fell. The security guard assisted her up. He assisted her to go and seat on a chair. Silindile asked for the chair for her. She remained on the floor for some time before the chair was brought and she was assisted to the chair.
- [10] The plaintiff testified that she was wearing flat leather shoes. She had not slipped anywhere else that morning. Silindile walked on the uncovered area and she did not trip on it. She noticed that the tiles had been removed from that area before she stepped onto it. She did not think that it would cause her to trip and fall. She walked normally in the uncovered area. She saw males in work clothes who were up in the shop about six (6) meters from the entrance. There were no workers at the entrance of the shop. She could not do anything to avoid slipping and falling. There were no signs at the entrance warning members of the public of the danger posed by the area not covered with floor tiles. She did not see any loose tile(s) in the area where she slipped and fell.
- [11] The plaintiff testified that she was assisted to go and sit on the chair. The chair was placed near the entrance near to where she had fallen. The employees called the store manager. The store manager came to her. The store manager apologized to her. He arranged for her to see the doctor. The doctor was in the same shopping centre not far from the defendant's retail outlet. She told the store manager to cover the area from which floor tiles had been removed on which she fell, to prevent what happened to her happening to other persons. The store manager sent for a mat to cover the area. A mat was brought and the area was covered with the mat. The mat was not big enough but it covered most part of the bare area.
- [12] She testified that a wheelchair was brought for her. She was wheeled to the doctor's room. She did not know the doctor. The doctor examined her and he treated her. He told her that she needed x-ray. He gave her an injection and he bandaged her on the injured ankle. It was her first time to be treated by that doctor. She did not pay for the treatment. She takes that the defendant paid for it.
- [13] Silindile Prudence Mtshali testified. She stated that she was with the plaintiff when they entered the defendant's retail outlet. It was at about 9h00. The security guard approached them at the entrance. He enquired of the purpose of the visit to the retail outlet. She

explained to the security guard that they worked for an entity, which sold beds. They were distributing pamphlets and advising people of the offerings by their employer. He allowed them to enter the shop. She testified that the plaintiff was next to her. She walked ahead and she heard the plaintiff screaming in pain. When she turned around, she saw that the plaintiff was on the floor, she had fallen. She fell on her back. She tried to assist the plaintiff to stand up. The plaintiff was in pain,

she could not stand up on her own, and she was too heavy for her. She asked the security guard to bring a chair for the plaintiff. He brought the chair and he assisted the plaintiff to sit on the chair. The store manager was called. He came and he apologized to the plaintiff. He said he would arrange for a doctor to see the plaintiff. The store manager talked to the plaintiff near the entrance of the shop next to where the plaintiff had fallen. The plaintiff showed the store manager where she fell and she asked the store manager to cover the area so that what happened to her would not happen to another person. The store manager sent one employee to fetch a carpet. The employee came with the carpet and covered the area where the plaintiff had fallen. The carpet was small and it did not fully cover the area.

[14] Ms. Mtshali testified that the area on which the plaintiff fell was not covered with tiles. The tiles had been removed from the area. She walked on the area but she did not trip and fall. She just walked on it and she did not take any precautions to avoid falling. She did not see the plaintiff actually falling. She saw a tile, which was loose but on its place in the area not covered with tiles. She saw the loose tile when she tried to assist the plaintiff to stand up after her fall. She was not sure whether it was one tile loose or more. The plaintiff was taken to the doctor. The store manager arranged for the plaintiff to be seen by

the doctor. She did not see any sign at the shop warning people that the store was being tiled. She did not see any area cordoned off with drums and danger tape. The area where the tiles had been removed on which the plaintiff fell was rough. She saw people in work overalls but they were inside the shop next to the tills.

[15] The defendant as its first witness called Khombisani Joseph Langa. He testified that he worked for the defendant. On the day of the incident, he was working near the tills. They were tilling the area. The area at the entrance of the shop was completely tiled. There was no area not covered with tiles at the entrance of the shop. He heard a female voice screaming. He saw a woman sitting on the floor at the entrance of the shop where she had fallen. His colleague was helping the woman to stand up. His colleague who was helping the woman is Phindile Maphela. The woman was sitting on the floor on an area covered with tiles. In May 2015, he was working in the shop of the defendant as a sales assistant. He did not work at the door of the shop as a security guard. The plaintiff and her companion did not speak to him at the entrance of the shop. He did not see any person who was with the plaintiff. There

was nobody at the shop's entrance working as a security guard. Nobody asked him to bring the chair for the plaintiff. He did not see the plaintiff falling and he does not know what caused the plaintiff to fall.

- [16] Mr. Langa testified that there was no grout or tile fix residue where the plaintiff fell. The area was clean. The cleaners clean the shop before the shop closed. He and Phindile lifted up the plaintiff where she had fallen. They placed her on the chair. He left the place where he was working and he went to assist the plaintiff at the entrance of the shop. He inspected the area where the plaintiff fell and there was no mud in that area. He does not remember whether it was raining or not at that time. He did not see who called the store manager. When the store manager spoke to the plaintiff, he had returned to his work area. There was no mat put to cover the area where the plaintiff fell. There were drums with danger tape at the entrance of the shop. The area near the tills they were tiling was cordoned off with drums and danger tape. They completed tiling the area at the entrance some days prior to the incident.
- [17] Happiness Phindile Maphela testified that on May 2015 she worked for the defendant as a salesperson and cashier. She was working on the day the plaintiff fell in the shop. She was in the middle of the shop assisting customers. The plaintiff fell at the entrance of the shop. She did not see the plaintiff falling. She fell where there were tiles. The laying of tiles was going on in the shop. They were tiling the area further up near the tills. She saw the plaintiff on the floor. She did not go to the plaintiff. She called the store manager from the back of the shop. The store manager came and he attended to the plaintiff. She did not hear the conversation between the plaintiff and the store manager. She at that time was busy assisting customers. She did not fetch the mat to cover the area where the plaintiff fell. The plaintiff sat on a chair near the entrance of the shop. A wheelchair was brought to take the plaintiff to the doctor. When the store is about to close it was swept and mopped. The incident took place in the morning. She could not remember whether it was raining or not. The plaintiff was with another woman. The plaintiffs companion was with the plaintiff when the store manager spoke to the plaintiff. She did not go to inspect the area where the plaintiff fell. She disputes that it was not tiled and that there was grout or tile fix remnants on it. The incident took place at about 10h00 or 11h00. The shop opened at 9h00 and no other person had fallen in that area.
- [18] Ms. Maphela testified that the store manager and Mr. Langa assisted the plaintiff from where she had fallen to sit on the chair. They lifted her up and took her to seat on the chair. She did not assist in lifting the plaintiff up and taking her to seat on the chair. At that stage, there was no security guard posted at the entrance of the shop. There were no drums with danger tape cordoning off the area at the entrance. She could not remember where in the shop was the area cordoned off.
- [19] Nazeer Hussain Randeree testified that he was the store manager. He did not see the plaintiff falling on 6 May 2015. A staff member called him from the back of the shop.. He went to the front of the shop. The plaintiff was on the floor. He phoned the doctor and he requested the doctor to attend to the plaintiff. The plaintiff was at the entrance of the shop. The area was

tilled and clean. Tiling was taking place inside the shop about 4 or 5 meters from the entrance. The area being tiled was cordoned off with danger tape. The entrance area was tiled about a week before the incident. There was no tile fix or cement residue in that area. He found the plaintiff on the floor and she was in pain. Somebody brought a chair for the plaintiff. The plaintiff was assisted to seat on the chair. At the time, he was concerned about the plaintiffs condition. He concerned himself about phoning the doctor arranging

that he attended to the plaintiff. The plaintiff was assisted from the floor by Mr. Langa , Ms. Mtshali and Nonto.

[20] Mr. Randeree testified that he could not remember the plaintiff requesting him to have a mat put on the area where she fell. He did not ask any staff member to fetch a mat. No mat was put on the area where the plaintiff fell. He did not inspect the area where the plaintiff fell. He was concerned about the condition of the plaintiff at the time. He apologized to the plaintiff for what happened. He paid the doctor for attending to the plaintiff. After few days, he phoned the plaintiff to find out her condition. The shop was cleaned every day before it is closed. All the staff cleaned the shop. Mr. Langa was assisting the people doing tiling by cleaning the place after tiling. Mr. Langa previously worked at the shop as a security guard. It was Mr. Langa's responsibility to ensure that no tile fix or cement residue remained on the floor after tiling. He was not concerned about what caused the plaintiff to fall and that it could cause other people to fall.

[21] The onus is on the plaintiff to prove on the balance of probabilities that she fell and got injured due to the negligence of the employees of the defendant. The plaintiffs case is that there was an area at the entrance of the defendant's shop from which tiles had been removed and it was left with hardened grout or cement remnants, which caused her to trip, slip and fall. In my view, to leave such an area at the entrance of a shop which might cause members of the public to trip and loose balance and fall without ensuring that members of the public are not injured by the presence of such an area constitute negligence. The defendant's version is that no such an area was left at the entrance of the shop.

[22] The plaintiff testified and she called Ms. Mtshali who was her colleague at the time as a witness. Ms. Mtshali's only association with the plaintiff is that they were at the time colleagues. It is limited association, which leaves Ms. Mtshali largely an independent witness. The defendant called three witnesses. The defendant employs the three witnesses and the defendant employed them at the time of the occurrence of the incident. The incident took place at the shop it was their shared responsibility to keep safe for defendant's customers. They could not readily accept fault on their part. However, in my view the issue of whether there was an area at the entrance of the shop not covered with 'tiles cannot be decided based on the association between the defendant and the witnesses it called. Such association is not of importance in deciding the issue. The plaintiff may not be expected to explain exactly how she tripped, lost her balance, slipped and fell. It suffices if on the balance of probabilities the area with removed tiles, grout, and cement remnants caused her to trip, loose her balance, slip and fall.

[23] The plaintiff and defendant presented conflicting versions on whether the plaintiff fell and got injured on an area from which tiles had been removed. It necessary to determine the credibility of the witnesses that testified for the plaintiff and those that testified for the defendant. The plaintiff and Ms. Mtshali testified in a straightforward and logical manner. They both answered all questions put to them without any hesitation. Further, they corroborated each other in all respects except that the plaintiff stated that she did not see any loose tile or tiles where she fell. Ms. Mtshali on the other hand testified that when she assisted the plaintiff to stand up she saw a loose tile or more than one loose tile where the plaintiff fell. Ms. Mtshali testified that the loose tile(s) was in its place but not stuck to the ground with tile fix or grout. If the tile(s) was in its place even if loose the plaintiff

might not have seen that it was loose. In my view, the apparent contradiction is not of significance.

[24] The defendant's witnesses although they were all adamant that there was no area not covered with tiles at the entrance of the shop, they contradicted each other in numerous respects. Mr. Langa testified that he did not see any person who was in the company of the plaintiff but both Ms. Maphela and Mr. Randeree saw Ms. Mtshali who was with the plaintiff. Mr. Langa said he and Ms. Maphela assisted the plaintiff from the floor to seat on the chair but Ms. Maphela stated that Mr. Randeree and Mr. Langa assisted the plaintiff. Mr Randeree said Mr. Langa, Ms. Maphela and Nonto assisted the plaintiff to stand up and to the chair. Ms. Maphela said she did not go to the plaintiff where she had fallen. The defendant's counsel put to the plaintiff and to Ms. Mtshali what the security guard who was at the entrance of the shop when they entered the shop would say. It was also placed on record that the security guard shall be called as a witness. However, all the defendant's witnesses testified that there was no security guard posted at the entrance of the shop. Mr. Langa said he never worked as a security guard but Mr. Randeree said that previously Mr. Langa worked as a security guard.

[25] The plaintiff gave clear evidence of the conversation between her and Mr. Randeree. Ms. Mtshali was with the plaintiff and she heard the conversation between the plaintiff and Mr. Randeree. The plaintiff and Mr. Randeree did not know each other. Mr. Randeree was called to attend to the plaintiff because he was the store manager. The only thing for discussion was the plaintiffs fall and injury. Both the plaintiff and Ms. Mtshali state that Mr. Randeree was shown where the plaintiff fell and the nature of the place where she fell was mentioned to him as the cause of her fall and injury. It resulted in that area covered with a mat. Mr. Randeree answered by saying that he cannot recall being told what caused the plaintiff to fall and he did not inspect the place where the plaintiff fell and he was not concerned that other persons might fall too, he was only concerned with the condition of the plaintiff. In my

view, Mr. Randeree's claimed attitude is improbable whereas the reaction of the plaintiff is the natural response. I find it unlikely

to say the least that the plaintiff and Ms. Mtshali would make up a story of a mat placed to cover the area where the plaintiff fell. It is also highly unlikely that they would falsely claim that a security guard approached them at the entrance of the shop. I find that the plaintiff and Ms. Mtshali were impressive witnesses. The defendant's witnesses, namely; Ms. Maphela and Mr. Randeree were poor witnesses and Mr. Langa was a very poor witness.

[26] The inconsistencies in the evidence of the defendant's witnesses compared to the corroboration in the evidence of plaintiff and her witness, which is also in accord with the probabilities, justify the rejection of the defendant's version on the issue in dispute. In the result, the plaintiff has proved that she fell and got injured due to the negligence of the defendant in leaving an area at the entrance of the shop where tiles had been removed uncovered and without any warning that such an area constituted danger.

[27] In the circumstances, it is ordered as follows:

1. Judgment on the issue of liability is granted in favour of the plaintiff.
2. The defendant is ordered to pay costs.

#### APPEARANCES

Case Number

: 2916/2016

For the Plaintiff

: R. Singh

Instructed by

: M.A.K Ameen & Company

Durban

For the Defendant

: G.M. Harrison

Instructed by

: Mooney Ford Attorneys

Matter argued on

: 6 October 2020

#### Judgement

delivered on : 22 October 2020

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