

SOUTH AFRICA / JUDGMENT

Pete v Boxer Superstore (Pty) Ltd (1785/2021) [2022] ZAECPEHC 9 (5 May 2022) [2022] ZAECPEHC 9

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

Gqamana

CASE / FILE NUMBER

1785/2021

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IN

THE HIGH COURT OF SOUTH AFRICA
(EASTERN
CAPE LOCAL DIVISION, GQEBERHA)

CASE

NO. 1785/2021

In

the matter between:

CAYMORE
MELISSA PETE
and
BOXER
SUPERSTORE (PTY) LTD

JUDGMENT

GQAMANA J:

- [1] On 3 September 2020, the plaintiff, Ms Pete was doing shopping for her grandmother at Boxer Superstore, Cleary Park Mall, when she slipped and fell on the floor. As the result of the fall the plaintiff sustained bodily injuries which then caused her to suffer damages. She sued the defendant, Boxer Superstore (Pty) Ltd and seeks to recover her damages. At the commencement of the trial, the parties requested my approval of their agreement at the pre-trial conference

that the trial should proceed and adjudicate the question of the defendant's liability separately and to let the issue of

quantum of damages to stand over for determination at a later stage. I accordingly granted an order in terms of Rule 33(4) and postponed the issue of quantum and proceeded with the trial on the issue of the defendant's liability.

[2] The case pleaded by the plaintiff in her particulars of claim is that:

2.1 the defendant has a legal duty to members of the public (plaintiff included) to ensure that its store was safe and free of any obvious hazards which would pose risk to them; and

2.2 the defendant was negligent because it failed to clean up the cake flour spillage on the floor and to ensure that the luxury aisle was clean and free of hazards which posed a risk to shoppers.
[1]

[3] The defendant in response to the plaintiff's claim denied that the hazards were obvious. It further pleaded that the plaintiff slipped and fell due to her sole negligence in that, she failed:

3.1 to keep a proper lookout;

3.2 to take reasonable and / or necessary steps in the circumstances to prevent her fall; and

3.3 to avoid injury to herself when she could and should have done so.

[4] As an alternative, the defendant pleaded contributory negligence on the part of the plaintiff.

[5] Clearly from the pleadings there are two issues that require determination namely, the wrongful conduct by the defendant and negligence.

[6] Only two witnesses testified at court, the plaintiff herself and Mrs Stride for the defendant. The plaintiff also presented evidence of a video footage which captured the incident inside the store when the plaintiff slipped and fell on the surfaced floor. The extract of this video footage was for a very short period of approximately thirty-two seconds and such evidence was not contested by the defendant.

[7] The plaintiff's evidence was that on 3 September 2020, at approximately 10h00 in the morning she went to Boxer Store at Cleary Park Mall for a shopping with her boyfriend's aunt and the latter's daughter. The store was busy because it was during the social grants payment period. The inside floors of the store were tiled with white tiles which were non-slippery. She was wearing flat pump ladies' shoes. She was not a debut shopper at the aforesaid store, as she had been there on numerous occasions. She conducted her normal shopping and she went to the till in order to pay for her purchases. She was informed by the cashier that because she has bought viennas, she was entitled to a free packet of hot dog buns. She then went back to fetch the buns at the bakery section. Three to four steps from the till at the luxury aisle section, as she turned the corner she slipped and fell. She noticed only after she had fell that there was a spillage of cake flour on the floor where she fell. Two

employees of the defendant came to assist her and she was taken to a room where she was given a first aid assistance.

- [8] The plaintiff under cross-examination admitted that had it not been the cake flour spillage, she would not have fell. She further admitted that she was in a hurry to fetch the buns from the back of the store at the bakery section and did not want to keep the cashier waiting because her trolley was already at the till. But she denied that she was running. She conceded that the cake flour spillage was not visible and she only saw it when she fell. It was further put to her that, the defendant's witness would testify that there was no spillage of flour on the floor where she slipped and fell, a proposition which was vehemently rejected by the plaintiff. She was unshaken on her testimony that she saw the spillage of cake flour where she fell.
- [9] The defendant called Mrs Stride as its witness. She was and is still employed by Boxer Store Cleary Park as an administrative clerk and a Supervisor. On the day in question she was busy with her duties and she was at the back of the store in the aisle close to the area where the plaintiff fell. She saw the plaintiff when she fell. She testified that she did not observe any cake flour on the floor before and even after the plaintiff fell. But she did not inspect the combo packages in that vicinity to check whether there was any broken item however one of her colleagues conducted the inspection. That colleague was not called to testify in this trial. The outcome of such inspection is unknown to me. She testified further that the employees of the defendant had an obligation to keep the floors clean and had she saw the cake flour spillage on the floor, she would have cleaned it.
- [10] Under cross-examination she testified that the plaintiff was behind her when she fell. She conceded that spillage of cake flour on the floor would have caused danger to the shoppers. She further admitted that, there were stack of 12.5 kg flours packed in the area where the plaintiff slipped and fell as depicted on the video footage. She further testified that she saw one of the defendant's male employee packing the flour and when the plaintiff fell, this employee was still busy packing. She further conceded that because that employee was still busy packing, he had not clean the area and he would have cleaned it after he had finished packing them. Of significance herein is that she conceded that on probabilities the flour on floor would have emanated from the floor bags that the employee was busy packing and that caused the plaintiff to slip and fell.
- [11] As mentioned in paragraph 2 above, the plaintiff pleaded that the defendant had a legal duty to keep the floors clean from any obvious hazards which would pose a risk to the shoppers. Furthermore, it is pleaded on her behalf that the defendant failed to clean the floor and as such it was negligent.
- [12] Having regard to the manner in which the case was pleaded and the evidence led my point of departure is that, in a case of liability for an omission, wrongfulness arises if the defendant had a legal duty to act positively. In *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as Amicus Curiae)*[2] it was said that:

“The appropriate test for determining wrongfulness [of an omission] has been settled in a long line of decisions of this Court. An omission is wrongful if the defendant is under a legal duty to act positively to prevent the harm suffered by the plaintiff. The test is one of reasonableness. A defendant is under a legal duty to act positively to prevent harm to the plaintiff if it is reasonable to expect of the defendant, to have taken positive measures to prevent the harm. ”

[13] I will first deal with the issue of wrongfulness. Mr Jooste, counsel for the defendant ardently argued that the plaintiff’s case as pleaded does not pass muster in that there were no obvious hazards which posed a risk to the shoppers. In advancing that argument, he made submission that there was no duty upon the defendant or its employees to inspect every corner of the store and there should have been something that triggered the duty. According to Mr Jooste, because the spillage of the flour on the floor was invisible, the defendant and/or its employees would not have been aware of such spillage on the floor. The defendant however accepted that had its employees been aware of the spillage, they should have cleaned it, but they were oblivious of its presence.

[14] In *Probst v Pick n Pay Retailers (Pty) Ltd*, [3] Stegmann J said the following:

“1. As a matter of law, the defendants owed a duty to persons entering their shop at Southgate during trading hours, to take reasonable steps to ensure that, at all times during trading hours, the floor was kept in a condition that was reasonably safe for shoppers, bearing in mind that they would spend much of their time in the shop with their attention focussed on goods displayed on the shelves, or on their trolleys, and not looking at the floor to ensure that every step they took was safe.

2. 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.”

[15] Mrs Stride testified that she or the defendant’s employees would have cleaned the spillage of the flour on the floor had she/they have been aware of its presence. She did not see the flour even after the plaintiff had fell. A fundamental portion of her testimony is her concession that there was an employee of the defendant who was busy packing the flour at the area or vicinity and the time when the plaintiff slipped and fell. Although the substance upon which the plaintiff slipped was not admitted by the defendant,

but her evidence lends credence to the plaintiff's version that she slipped on the flour which was on the floor. Mr Jooste correctly so, conceded that the plaintiff slipped on flour is not an improbable inference to be drawn. As summarised somewhere above in this judgment the plaintiff's testimony was that she saw that there was a spillage of the cake flour on the floor and she only noticed the spillage after she had slipped and fell. Her evidence was further that it was the flour that caused her to slip and fall.

[16] In *Holtzhausen v Cenprop Real Estate (Pty) Ltd and another*,^[4] a judgment which I was referred to by Mr Jooste, the court re-iterated the principle that the duty to take reasonable steps to safeguard shoppers to a mall and the floors in it from the risk of danger or harm falls on the owner of the mall.

[17] In the instant matter, the defendant or its employees had the legal duty to keep the floor clean and free of hazards to the shoppers. The mere fact that the defendant's witness Mrs Stride had not seen the spillage on the floor does not absolve the defendant of its legal duty. The plaintiff's evidence was clear that although she had not seen the flour before she slipped but she saw it as she slipped and it was visible. She however could not provide any explanation why she did not see the flour before she fell. I cannot lose sight of the fact that the flooring inside the store was white tiles and the cake flour is a white substance, and its visibility when spilled on such surface would not be readily glaring. Further as postulated in *Probst* (supra), shoppers inside a store focus their attention on the goods on the shelves and not by looking at the floor to ensure it was safe. Here, the plaintiff's attention was to get to the bakery section to get the hot dog buns that she was looking for. It was for the defendant or its employees to ensure that there were no substance on the floor which posed danger to the shoppers and to keep the floors clean. The defendant failed to keep the floor at its store clean and free of hazards and accordingly it breached its legal duty. Such failure therefore to take steps to prevent harm to the shoppers constitutes wrongful conduct on the part of the defendant. In *Brauns v Shoprite Checkers (Pty) Ltd*,^[5] Jones J, confirmed and applied the principle that a supermarket owner owes a duty to persons entering its shop to take reasonable steps to ensure that spillages on the floor are not allowed to create a potential hazard to the shoppers.

[18] On the question of negligence, the test is that set out in *Kruger v Coetzee*.^[6]

"For the purposes of liability culpa arises if:

- (a) a diligens paterfamilias in the position of the defendant;
- (i) would foresee the reasonable possibility of his conduct injuring another in his personal property and causing him patrimonial loss; and
- (ii) would take reasonable steps to guard against such occurrence; and
- (b) the defendant failed to take such steps."

[19] The main contested issues by the defendant are the foreseeability and the reasonable steps that should have been taken to guard against the plaintiff slipping and injury herself. It was pleaded and argued on behalf of the defendant that, the incident was caused by and due to the sole negligence of the plaintiff in that:

19.1 she failed to keep a proper lookout in respect of the surface upon which a reasonable shopper would be required to walk upon;

19.2 she failed to take reasonable or necessary steps to prevent her from falling; and

19.3 she failed to avoid injury to herself, where she could and should have done so.

[20] It is common cause that the inside floors of the store were white non-slipper tiles. The plaintiff was wearing flat pump shoes. It was not her debut visit in the store, she had been to the store on many times, before this incident. The shop was busy. She had proceeded with her shopping up to the stage where she had approached the till section with her trolley to pay for her groceries. She was informed by the cashier that she qualifies to get a free packet of hot dog buns because she had purchased a packet of viennas. She left her trolley at the till and walked to the back of the store to the bakery section. She was not running but was walking at a faster pace than normal. Three or four steps from the till section, as she turned a corner at the luxury aisle she slipped and fell. As she fell she not a spillage of cake flour on the floor. The flour was visible, but was not large quantity. As she walked to the bakery section her attention was not on the floor but to her intended destination.

[21] The defendant witness, Mrs Stride, testified that a male employee of the defendant was busy unpacking the flour on the pallets at aisle where the plaintiff slipped and fell. It was also clear from the video footage that the plaintiff slipped on something. The plaintiff's evidence is that she slipped on the cake flour on the floor because she saw it as she fell. Although the defendant's witness testified that there was no flour visible in the vicinity but Mr Jooste accepted that it is not an improbable inference that plaintiff fell on the flour.

[22] On the probabilities, the flour on the floor emanated from the bags of flour and the spillage occurred when they were stacked on the pallets and the defendant's employees failed to clean up the flour which was messed on the floor. The duty to keep the floor clean rests with the defendant's employees, this was much conceded by the defendant's witness, Mrs Stride. It was not an onerous task for the defendant's employees to clean the flour which was on the floor. The shop was very busy and under the circumstances leaving the flour on the floor created a dangerous hazard to the shoppers and to the plaintiff.

[23] I was referred to various authorities on the slip and fall cases[7] by Mr Niekerk, plaintiff's counsel. Apposite to the facts herein, in *Ramonyai v L P Malope Attorneys*,[8] the court held that the shop owner and its employees should have foreseen the possibility of customers slipping and falling on the strewn maize meal and they had duty of care to take reasonable precautions to warn customers of the strewn maize meal because it posed danger and further they had a duty to sweep the maize meal from the aisle in order to prevent

customers from stepping and falling because of it.

[24] The incident herein was caused by the sole negligence of the defendant and its employees because they failed to keep the floor free of hazards, by cleaning the flour on the floor. Although the defendant pleaded contributory negligence, but Mr Jooste did not press for such and accepted that on the evidence herein there is no scope for apportionment.

[25] With regard to the issue of costs, there is no reason why the general rule namely, that the costs follow the results should not be applied.

[26] In the circumstances, the following order is issued:

1. The defendant is declared to be liable to the plaintiff for such damages as a result of her fall on 3 September 2020 at the defendant's premises at Cleary Park Shopping Mall, Gqeberha as may be proven.
2. The defendant is ordered to pay the plaintiff's costs of the merits.

N GQAMANA

JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Plaintiff : Mr W D Niekerk

Instructed by

: Langson & Associates Attorneys

Gqeberha

Counsel for the Defendant : Mr P E Jooste

Instructed by

: Swarts Attorneys

Date heard

: 26 April 2022

Date judgment delivered : 5 May 2022

[1] Main Index; p 6 paras 4 and 6 of the particulars of claim.

[2] 2003 1 SA 389 (SCA) 395

[3] [1998] 2 All SA 186 (W) at 200 d – f.

[4] [2021] 2 All SA 457 (WCC) at par [60].

[5] 2004

(6) SA 211 (ECD).

[6] 1966

(2) SA 428 (A) at 430E.

[7] Gordon v Da Marta 1969 (3) SA 285 (A), Ramonyai v LP Molohe Attorneys

[2014] JOL 32399 (GJ), Avonmore Supermarket CC v Venter 2014 (5) SA 399 (SCA) and Ngubeni v South African Transport Services 1991 (1) SA 756 (A).

[8] At para [59].

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