

SOUTH AFRICA / JUDGMENT

Stacey v Supercare Services Group (Pty) Ltd (A380/2017) [2018] ZAWCHC 117 (13 September 2018) [2018] ZAWCHC 117

COURT

Western Cape High Court, Cape Town

BEFORE

Bozalek, Fortuin, Nuku

CASE / FILE NUMBER

A380/2017

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THE

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH

AFRICA

(WESTERN CAPE DIVISION, CAPE

TOWN)

Case

No: A380/2017

Before the Hon. Mr

Justice Bozalek, the Hon. Mrs Justice Fortuin

and the Hon. Mr

Justice Nuku

Hearing: 30

July 2018

Judgment

Delivered: 13 September 2018

In

the matter between:

PAMELA

GAIL

STACEY Appellant

and

SUPERCARE

SERVICES GROUP (PTY)

LTD Respondent

JUDGMENT**BOZALEK J**

[1] This is an appeal against a judgment dismissing the appellant's claim for damages following injuries which she suffered after

slipping and falling in a shopping centre.

[2] The appellant brought the action against the owners of the Canal Walk shopping centre ('Canal Walk' or 'the Centre') in Cape Town and the cleaning services company which was contracted to provide cleaning services to the Centre. Before trial the

appellant withdrew her action against the owners of the Centre leaving as the only respondent, the cleaning services company ('the respondent'). By agreement the merits were separated from the quantum and heard first. The appellant herself testified and she called the evidence of a loss adjustor who testified mainly about the adequacy of the respondent's cleaning regime. The respondent led the evidence

of Ms Julian Kruger, its manager at Canal Walk and also a Mr Robert Cooper, the respondent's Western Cape general manager. It also led the evidence of an expert insurance loss adjustor, Mr Brian Wright, who investigated the incident when the litigation commenced in order to advise the insurance underwriter whether there was a risk of a successful claim. This required him, in turn, to investigate the adequacy of the respondent's cleaning regime.

[3] In brief the appellant, who was 53 years old at the time of the incident, testified that she had lunched at a restaurant in Canal

Walk and was walking down one of its walkways back to her place of work when she slipped and fell heavily. She did not see, nor was she able to identify, what she slipped on. The respondent admitted in the pleadings that a liquid substance had been spilt on the walkway at the point where the appellant slipped and fell. There were several reports from second-hand sources that the substance in question had been a spilt ice-cream. Much of the evidence in the trial dealt with the exact nature of the cleaning regime implemented by the respondent at Canal Walk at the time in question and, whether, comparatively speaking, it was an adequate cleaning regime and whether it had been adhered to on the day of the incident.

The pleadings

[4] In the particulars of claim it was alleged that the respondent was the appointed cleaning contractor at the relevant time and was

responsible for the maintenance, safety and cleanliness of the Centre; further, that it was obliged to take reasonable steps to

protect the safety of members of the public who visited the Centre by, inter alia, ensuring that the floor of the Centre was clean and free of any spillage rendering it slippery.

[5] It was further alleged that the respondent had been negligent in that it: permitted a spilled liquid substance to be present upon the floor rendering it slippery and dangerous to the appellant; failed to take any or adequate measures to remove the substance from the floor; failed to maintain the floor in a clean, dry and reasonable state of cleanliness and failed to devise and/or implement a cleaning regime so as to ensure that the floor of the premises was maintained in a clean, dry and reasonable state of cleanliness.

[6] The respondent admitted in its plea that the appellant had slipped and fallen but averred that neither it nor its employees were aware or could reasonably have been aware at the time of any wet and/or slippery floor. In the alternative, the respondent pleaded that the appellant was contributorily negligent in that she had failed to observe the area of the floor across which walked.

The Court a quo's findings

[7] In dismissing the appellant's claim the Court a quo held that there was no direct evidence before the Court that she had slipped and fallen on the liquid substance which the respondent had admitted was on the floor of the mall in the vicinity where the appellant had fallen. Noting that the appellant sought that an inference be drawn that she slipped and fell on the liquid substance, the Court found that this inference had not been shown to be consistent with the proved facts or to be more probable than that the appellant fell for a reason other than that she slipped on the liquid substance. In this regard the Court a quo noted that the appellant wore plastic Croc shoes; that she had been walking fast immediately prior to falling; and that she had

previously had surgeries to her knee and back. The Court noted too that CCTV footage showed approximately 25 people walking across the same area in the two minutes before the appellant's fall without mishap; further, that no additional details as to the nature or extent of the spilt liquid substance were proved nor its precise proximity to where the appellant slipped.

[8] The above findings put paid to the appellant's claim but the Court reasoned further that, even if it was incorrect in finding that the necessary inference could not be drawn, the appellant had failed to discharge the onus of proving that the respondent ought to have foreseen the possibility of its conduct (or more accurately its omission) injuring a person in the position of the appellant and that it failed to take reasonable steps to guard against such occurrence. In this regard the Court found that the evidence supported the conclusion that the respondent had in place an appropriate and adequate cleaning regime and that it adhered to that regime; further, that the respondent took the necessary steps to guard against and act upon the potential hazard caused by spillages and provided staff training and supervision in doing so. Nor was the Court persuaded that the adequacy of the respondent's cleaning regime was compromised by the limited number of staff employed as cleaners, the fact that no radios were provided to such cleaners on duty or the size of the walkway area

allocated to each cleaner to clean during the day shift.

- [9] The Court also found that the respondent had foreseen the harm that might arise were a spillage not to be identified and cleaned but that it enforced its cleaning regime which included the implementation of its protocol for spillages to minimise the risk of such harm and in so doing took reasonable steps to guard against and act upon spillages. It found that there was no evidence of the respondent being negligent in its failure to detect the spillage nor that the spillage in question had remained undetected for an unreasonably extended period.
- [10] Finally, the Court found that the respondent's conduct had not fallen short of the standard required in the circumstances which were that the harm to the appellant was not reasonably preventable and adequate systems were in place to prevent spillages and remove them when they occurred. It found that there was no evidence that the respondent knew or ought to have been aware of the presence of the spillage and failed to take reasonable steps to remove it at least with reasonable promptitude.

Grounds of appeal

- [11] The appellant advanced three main grounds of appeal, namely that the Court a quo erred and misdirected itself in finding that:
1. the appellant had failed to prove that she slipped on the liquid substance on the walkway as opposed to having slipped and fallen for any other reason;
 2. the respondent had in place an appropriate cleaning regime; and
 3. on the day of the incident, the respondent had adhered to its cleaning regime.
- [12] Before dealing with these issues it is appropriate to briefly set out the evidence given by each of the witnesses.
- [13] The appellant testified that she worked in Century City near Canal Walk and visited the Centre virtually every day. On the day in question she lunched at a restaurant and then walked back through the Centre to work. The route she took was from Stuttafords towards Pick 'n Pay along the lower mall. As she passed a shop called Zoot she slipped and fell heavily. She was unable to move and it later transpired that she had fractured her left fibula, dislocated her left knee and sustained torn ligaments. As a result of these injuries she eventually underwent a total of 11 surgical procedures. The appellant had not seen anything on the floor which could have caused her fall but afterwards she had noted that there were traces of a liquid substance on her clothing.
- [14] It was common cause that the appellant was wearing Crocs at the time of the incident and was walking at a brisk pace. On two occasions when the appellant returned to the Centre thereafter she noted spillages of what appeared to be ice cream on the floor. She reported the spillages to cleaning staff and took photographs.

[15] The only witness called by the appellant was a Mr Charles De Meillon, a loss adjustor appointed by the appellant to investigate the circumstances surrounding the incident. He testified that the Canal Walk shopping centre is located in Century City and comprises more than 400 000m² of office and retail space. It has more than 400 shops and 48 restaurants and food outlets. The walkway in which the appellant fell and which was being cleaned by one cleaner at the time was approximately 200m in length and varied in width from approximately 12m to between 30m and 40m. Kiosks and other obstructions in the walkway hamper visibility in the area requiring cleaning. On a week day in February 2017 i.e. some five years after the incident which took place on 12 January 2012, Mr De Meillon carried out an inspection of the site where the incident took place. He noted there was a high volume of pedestrian traffic in the walkway and observed one cleaner cleaning the walkway from Stuttafords to Pick 'n Pay. The cleaner focussed her attention on cleaning the floor directly in front of her and did not shift her head to check her surroundings. On the return trip back from Pick 'n Pay to Stuttafords the cleaner emptied out nine refuse bins, emptying them into one large bin which was then taken to a service alleyway. During his hour and a half long inspection, Mr De Meillon observed a cleaning supervisor on one occasion but that person did not communicate with the cleaner. Mr De Meillon expressed a view regarding the adequacy of the cleaning regime but admitted in evidence that he was not an expert in such matters and therefore I will say no more in this regard.

[16] Ms Julian Kruger, who at the time of the incident was the Cleaning Contract Manager for the respondent at the Centre and the appointed

Health and Safety Officer, testified on behalf of the respondent. When the trial took place the same cleaning programme had been in existence since 2007. A Service Level Agreement ('the agreement') concluded between the respondent and the Centre's

owners in 2010 stipulated that the respondent had to provide a minimum of six cleaners and a maximum of 12 to clean the floors of the Centre. The walkway was one of eight similar walkways at the Centre, four on the ground level and four on the first floor level. The cleaning programme for the walkway in question was that the cleaner would start at Stuttafords and walk and sweep the area from there to Pick 'n Pay. On the return trip the cleaner would empty the dustbins and waste and take this to the service alleyways. On the second round trip the cleaner would return from Stuttafords cleaning direction boards, dustbin holders, shop facades and other low level infrastructure. On the return trip the cleaner would continue to sweep and clean. This cycle would be repeated continuously. Ms Kruger conceded that this was a lot of work for one cleaner to carry out over a 200m long walkway. A total of eight cleaners were allocated to the upper and lower level on the day shift, four of them on each level cleaning a walkway similar to that where the incident took place. Eight cleaners were assigned to a total of four toilets with a further two cleaning 'back passages'. There was one cleaner at each of the four entrances to the Centre and five cleaners at and around the food court where most of the spillages were anticipated. A total of 57 cleaners are on duty, covering both the upper and the lower level of the mall. Additional

cleaners were employed over the Christmas holiday period until the schools reopened which, on the occasion in question, was the day before the incident.

[17] On the day of the incident Ms Kruger had been on leave and therefore could give no direct evidence as to what happened. Her position had been filled by a Ms Solomons who had since passed away. The supervisor on duty that day was a Ms Louise Barnard whilst a Ms

Cwaba, who had subsequently left the employ of the respondent and passed away, was the cleaner rostered to work the afternoon shift on the walkway on the day in question. The respondent operated a seven double hour shift programme (excluding a one hour break), the first shift commencing at 7am and ending at 3pm and the second shift commencing at 1pm and ending at 9pm.

[18] In Ms Kruger's experience there had been up to three spillages during one shift in one section of the walkway i.e. one quarter of the walkways per level. She was also aware of between five and eight cases of injuries sustained by visitors to the Centre when they slipped and fell as a result of spillages whilst she was on duty. After the incident the respondent had reassessed their cleaning

programme but concluded it was not necessary to increase the number of cleaners on the walkways.

[19] Mr Robert Cooper, the respondent's Western Cape General manager, testified that he had been employed by it for 11 years and that the gross lettable area in the Centre was 141 000m² in extent (excluding the internal passageways). Of that area, approximately 19% (approximately 27 000m²) comprised the common area of the Centre which the respondent was required to clean. The walkway between Pick 'n Pay and Stuttafords where the incident occurred was approximately 200m long, varying in width from 10m to 12m and in some instances 30m to 40m.

[20] Mr Cooper testified that it was an 'unwritten rule' in the industry that an area of 1200m² would be allocated per cleaner as a minimum area. An assessment of the particular environment would determine whether more or less cleaners were required. After the incident involving the appellant the respondent

had carried out an investigation but concluded that the same cleaning system, first instituted in 2007, should continue to be followed at the Centre. According to information provided by the Centre's owners, 21 million persons visited it in 2016. Mr Cooper testified that the cleaning of floors was regarded by the respondent as 'not critical' and it did not regard the prevention and cleaning of spillages as a priority since the respondent was not 'an emergency response cleaning contractor'.

[21] Finally, Mr Brian Wright, an insurance loss adjustor, testified as an expert witness for the respondent. He was requested by the insurance underwriters to investigate the incident and prepare a report which he did after meeting on site with Ms Kruger and Ms Barnard in April 2015 when he discussed the cleaning regime with them and took photographs. Mr Wright

concluded that there was evidence to suggest that an ice-cream was dropped on the floor in front of the Zoot shop sometime between the last sweep and the appellant's arrival at the accident scene. He concluded that the respondent was not negligent in the execution of its duties in providing the cleaning service.

The law

[22] As was stated in *Kruger v Coetzee*,^[1] '[f]or the purposes of liability culpa arises if -

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

[23] A leading case dealing with delictual liability for the consequences of spills in public places is *Probst v Pick 'n Pay Retailers (Pty) Ltd*,^[2] where Stegmann J was faced with a claim against a shopkeeper by one of whose customers suffered damages as a result of a fall on an oil spillage in one of its shops. In considering what the duty of a shopkeeper was in these circumstances, the Court reviewed a range of relevant authorities both local and from the United Kingdom. It held that the shopkeeper owed a duty to persons entering its shop to take reasonable steps to ensure that 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 focused on goods displayed on their shelves and not looking at the floor to ensure that every step they took was safe. It held further that the duty on the shopkeeper to take such reasonable steps was not so onerous as to require that every spillage had to be discovered and cleaned up as soon as it occurred. However, it did require a system which ensured that spillages were not allowed to create potential hazards for any material length of time and that they would be discovered, and the floor made safe, with 'reasonable promptitude'.

[24] In so holding, the learned Judge quoted with approval the following passage from the judgment of Megaw LJ in *Ward v Tesco Stores Ltd*:^[3] 'It is for the [appellant] to show that there has occurred an event which is unusual and which, in the absence of explanation, is more consistent with fault on the part of the [respondents] than the absence of fault; and to my mind the learned Judge was wholly right in taking that view of the presence of this slippery liquid on the floor of the supermarket in the circumstances of this case: that is that the [respondents] knew or should have known that it was not an uncommon occurrence and that if it should happen, and should not be promptly attended to, it created a serious risk that customers would fall and injure themselves. When the [appellant] has established that, the [respondents] can still escape from liability ... if they could show that the accident must have happened, or even on balance of probability would have been likely to have happened, irrespective of the existence of a proper and adequate system, in relation to the

circumstances, to provide for the safety of customers’.

[25] Stegmann J then observed that all three members of the Court in Ward were of the view that the appellant had the onus of proving negligence on the part of the respondents and that this would be proved if the fact was that the slippery spillage had remained on the floor for a period longer than was reasonably necessary to discover

it and clear it up.[4] Where the minority of the Court differed was over the question of whether the appellant’s evidence that she had slipped and fallen in a spillage on the shop floor was sufficient in the absence of rebutting evidence to justify the prima facie inference that the slippery spillage had remained on the floor longer than was reasonably necessary to discover it and clear it up. The majority held that such an inference was justified but one member of the Court held that it was not.[5]

[26] Commenting on this difference of opinion Stegmann J stated as follows:

‘There is a sound reason of policy why the majority view should be followed: it is that in such a case the [appellant] generally cannot know either how long the slippery spillage had been on the floor before it caused his fall, or how long was reasonably necessary, in all of the relevant circumstances (which must usually be known to the respondent), to discover the spillage and clear it up. When the [appellant] has testified to the circumstances in which he fell, and the apparent cause of the fall, and has shown that he was taking proper care for his own safety, he has already done as much as it is possible to do to prove the cause of the fall was negligence on the part of the [respondent] who, as a matter of law, has the duty to take reasonable steps to keep his premises reasonably safe at all times when the members of the public may be using them. ... It is therefore justifiable in such a situation to invoke the method of reasoning known as *res ipsa loquitur* and in the absence of an explanation from the respondent, to infer prima facie that a negligent failure on the part of respondent to perform his duty must have been the cause of the fall’.[6]

[27] The judgment in Probst was referred to with approval by the Supreme Court of Appeal in Checkers Supermarket v Lindsay,[7] another case involving a supermarket customer slipping on an oily substance on the supermarket floor. The appellant succeeded in the Court a quo and in dismissing the appeal, the Supreme Court of Appeal stated as follows:

‘The court below reasoned amongst others that emphasis on the length of time the spillage remained undetected, without consideration of the adequacy of the cleaning system, was an artificial and unrealistic test. The court went further and reasoned that the adequacy of the system had to be considered against the number of cleaning staff allocated to deal with spillages, the floor area and number of shopping aisles’.[8]

[28] Chartaprops 16 (Pty) Ltd & Another v Silberman[9] concerned, as does the present case, the consequences of a failure to clean a slippery substance in a passage in a shopping mall. The complaint was the same as that in the present matter, namely, that the respondent negligently omitted to detect and remove the hazard and was thus liable for the

consequences for the omission. In Chartaprops, the owner of the shopping centre and not its contracted cleaner was sued. Nonetheless, the Court's remarks about the adequacy of the cleaning system implemented by the cleaning company are relevant:

'Advanced Cleaning had a system in place for cleaning the floors, the details of which are not important. It is sufficient to say that every part of the floor should ordinarily have been passed over by one or other of the cleaners in the employ of Advanced Cleaning at intervals of no more than five minutes. I think it is clear that the system, if it was adhered to, was adequate to keep the floors in a reasonably safe condition. It is also not disputed that Chartaprops itself kept a regular check on the contractor's performance. Its centre manager consulted each morning with the cleaning supervisor and personally inspected the floors of the shopping mall daily to ensure that they had been properly cleaned. If he encountered litter or a spillage he would arrange for its immediate removal'.^[10]

[29] The Court a quo had held that the owner and the contracted cleaner were jointly and severally liable to the appellant. On appeal, the Supreme Court of Appeal found that by engaging a competent contractor, the first appellant (the owner) took the care which was incumbent on it to make the premises reasonably safe. There was no way for the first appellant to have known that the work of the second appellant (the cleaner) would be defective. It held that the first appellant had therefore not been negligent and that the damage complained of was caused solely by the negligent act or omission of the second appellant, accordingly finding that the first appellant was not liable but the finding in relation to the second appellant (the cleaner) could not be faulted.^[11]

The

issues

[30] Against this background the issues on appeal are reflected in the three main grounds of appeal and accordingly I turn to the first, namely, whether the Court a quo erred in finding that the appellant had failed to prove that she slipped on the liquid substance on the walkway.

[31] In making this finding the Court a quo reasoned that there was no direct evidence before it that the appellant had slipped and fallen on what had been admitted by the

respondent as being a liquid substance on the floor of the mall in the vicinity of where she fell. In this regard it is important to note that in response to the appellant's request for trial particulars the respondent admitted that 'a liquid substance was on the floor of the mall in the vicinity of where appellant fell'. It also admitted that 'it was obliged to take reasonable steps to protect the safety of members of the public, such as [appellant], by, inter alia, ensuring the floor of the said premises was clean and free of any spillage'. The Court a quo reasoned that there was no direct evidence before it that it was on this substance that the appellant slipped and fell and that an inference to this effect was not more likely than not given that people may slip and fall for a range of reasons including negligence,

inadvertence or oversight on their part. In the present circumstances, it reasoned further, that given that 25 people had walked across the same area in the two minutes preceding the accident, all without mishap, that the appellant wore plastic Croc shoes, that she had walked fast and that she had had prior surgeries to her knee and back, the inference sought to be drawn could not be made.

[32] In my view none of the reasons provided by the Court a quo, either singly or cumulatively, justify the finding that the inference sought could not be drawn. The fact that the appellant wore a particular make of shoe and walked fast is neither here nor there. Similarly, the fact that 25 other people who walked past the same area did not slip and fall takes the matter no further. Each one of them may have avoided putting his or her foot on the liquid

substance. Nor is there is any evidence that in walking in the manner that she did or wearing the footwear which she did, the appellant was not acting reasonably or safely. The suggestion that it was equally probable that she could have fallen because of a pre-existing

disability is similarly not borne out by the evidence. There was nothing in the evidence to suggest that the appellant would suddenly

slip and fall for no apparent reason. Her evidence is what one might expect of many in the appellant's situation, namely, that she suddenly fell and that in the condition in which she found herself i.e. in extreme pain, she paid no attention to trying to ascertain there and then what had caused her to slip. The Court appeared also to have erred in finding that apart from the fact that it was a liquid substance, no further details as to the nature or extent of the spillage were proved. Although the evidence as to the nature and extent of the spillage was indirect or of a hearsay nature there was in my view more than sufficient to indicate the size of the spillage and that it comprised of spilt ice-cream. In the report of the investigation into the incident, the Security Manager of the Centre, a Mr Jan Dreyer, recorded that a security officer had reported that the appellant slipped on 'spilled ice cream', that the spillage 'appeared to be a brown mixture of approximately 5cm long, and ... was lying on a brown spotted (similar colour as spillage) floor tile ...'. In two further written incident reports it was recorded that the appellant fell 'on a slippery ice cream floor' and on 'an ice-cream on the floor in front of Zoot'.

[33] For the purposes of his report, Mr Wright, the respondent's loss adjustor, accepted that the appellant slipped on what appears to have been ice cream dropped on the walkway floor. He also recorded that Mrs Barnard (the respondent's supervisor on the day in question) had received a call from security advising that there was 'ice-cream' on the floor outside Zoot and that a customer had slipped and fallen. Subsequent to the incident the appellant herself had observed two separate spillages of ice-cream at the Centre.

[34] Taking all this into account, I regard it as highly improbable that notwithstanding the presence of an ice-cream spill outside the Zoot shop, the appellant slipped and fell at that location on that occasion for an unrelated reason.

[35] Having found that the ice-cream spillage was the cause of the appellant slipping and falling, the issue which now arises is whether the respondent had in place an appropriate and adequate cleaning regime with the result that, notwithstanding that it did not detect and clear the spillage, it was not negligent in failing to do so.

[36] This question was considered by the Court a quo which reasoned that even if a significantly greater number of cleaners was employed to clean the walkways, this would not reduce

the number of spillages, nor necessarily allow for quicker detection of spills. The Court a quo noted that the cleaner was on duty in the walkway on the day of the appellant's fall and had recently passed by the area in which she fell. It found further that the evidence supported a conclusion that the respondent had in place an adequate cleaning regime, that it adhered to that regime, that it foresaw that harm might arise were a spillage not to be identified and cleaned but that it enforced a regime which included the implementation of a protocol on spillages to minimise the risk of such harm arising. In the circumstances, the Court concluded that the respondent had taken reasonable steps to guard against, and act upon, spillages.

[37] In my view, however, the respondent's own evidence suggests that its managers had failed to appreciate the implications of its responsibilities in regard to the hazards of spillages. Mr Cooper testified as follows in his evidence in chief:

'Now do you take safety, and in particular the danger of spills, and slips as a result of spills, into account when doing your planning? --- Not slip and falls particularly. Remember, we're a maintenance cleaning contractor, we're not an emergency response cleaning contractor'.

[38] In cross-examination he reinforced this evidence as will be seen from the following passage:

'But you said in your evidence you don't really apply your – or gear your cleaning regime to deal with this kind of situation,

because you're not what – I think you said you're not an emergency service, or you don't really regard yourself as having to guard against those sort of accidents. ... Routine maintenance cleaning. Correct.

But surely this is an error? --- No, it is not.

And therefore you don't believe that it's worthwhile putting another cleaner on duty on those walkways? --- I never said that, and I am not saying that.

So you think there should be a second cleaner on duty on the walkways ... (intervention) --- From a cleaning regimen point of view, there is sufficient cleaning staff on site, and there have been for the last 10 years'.

[39] In re-examination Mr Cooper testified that although additional cleaning staff were employed in critical areas such as bathrooms during peak times, walkways were not regarded as critical areas.

- [40] Bearing in mind the dictum in Checkers Supermarkets that the adequacy of a cleaning system had to be considered against the number of cleaning staff allocated to deal with spillages, the floor area and the number of shopping aisles, the question of the scope of duties of the sole cleaner on duty in the specific walkway was clearly of cardinal importance. To these factors can also be added the heaviness of the traffic along the walkway or the 'footfall' as it was referred to in evidence. Ms Kruger, who designed the cleaning programme and testified in regard to these matters, had no knowledge and appeared to have taken little account of the footfall or the physical area covered by the cleaner on duty. Ms Kruger was unable to even give an indication of what the foot count at Canal Walk was beyond stating that it was comparable to that at the V&A Waterfront. Nor had she calculated the size of the common areas which had to be cleaned, and in particular the walkways, despite having allegedly taken the area into account in devising the cleaning regime.
- [41] Evidence from other quarters was that the traffic along the walkway in question was heavy. Based upon the evidence that 21 million customers visited the Centre in 2016, on the assumption that an equal number of persons visited the Centre daily this would amount to an average of at least 57 000 visitors per day. Adjusting this for heavier traffic on weekends and the fact that the incident took place in 2012, a rough estimate of daily traffic during the weekdays would surely be at least 25 000 visitors per day. The busyness of the traffic on the walkways was borne out by the CCTV footage of the incident which revealed that in less than two minutes immediately before the incident in question, 22 persons crossed the area in front of Zoot where the appellant slipped and fell and another three entered or exited that shop. Extrapolating this would see approximately 660 people moving past that point in an hour or 330 in half an hour.
- [42] As far as the total area of the walkway is concerned, at an average width of 12m, itself probably an underestimate given that at times the width increased to 40m, this makes for a total area of some 2400m² which is double the minimum area a cleaner must clean in terms of industry standards. Also of relevance to the adequacy of the cleaning regime was the fact that the Service Level Agreement provided for a maximum of 12 cleaning staff to be allocated to the walkways yet only eight were allocated at the time of the incident i.e. one per quarter. Mr Cooper conceded that employing extra cleaners in the walkways would be affordable and minimise spillages and possible accidents involving members of the public:
- 'So to employ an extra cleaner on every walkway, it would only be four extra cleaners, it would not be a vast amount of expenditure, would it? --- Probably not, no.
- And it would, one must obviously logically accept, improve the cleanliness and probably reduce the chances of spillages not being
- detected and people unfortunately slipping --- I agree'.

- [43] Evidence of the minimum wage paid to cleaners by the respondent underlines that the cost of allocating two cleaners per walkway rather than one would have had very little impact upon the Centre's cleaning budget.
- [44] An important fact in the evaluation of the adequacy of the cleaning regime is how long it would take for a spill to be detected. The appellant submitted that a full cleaning cycle i.e. from Stuttafords to Pick 'n Pay and back took between 30 and 40 minutes, from basing this on the observations which its expert witness made several years after the incident. Respondent's counsel submitted that the cleaner on duty would take approximately 30 minutes to complete a cleaning cycle. In my view the estimate of 30 to 40 minutes appears realistic particularly in view of the fact that the evidence suggested that the cleaner followed a circular cleaning route i.e. first cleaning one side of the walkway and, upon reaching the end, proceeding down the other side of the walkway.
- [45] In her heads of argument, respondent's counsel herself described the cleaning regime as involving the cleaner moving 'methodically' in a circle although she later sought to distance herself from this proposition and to suggest that the cleaner cleaned the entire width of the corridor on every pass. Given the width of the walkway, some 12m to 20m and at times reaching 40m, it would seem more likely that Mr De Meillon's observation was correct and that the cleaner would clean one side on one pass and then the other side of the walkway on the next pass. This appears to have been accepted by the respondent in evidence as appears from the following passage from Mr De Meillon's cross examination:
- '--- That is correct. She works the one side at a time. So if, for arguments sake the walkway is 12m, she [does] 6m at a time.
- And that would be the 6m closest to Zoot, because you said she went down the left hand side. --- that is correct, M'Lady.'
- [46] Of course, the significance of this evidence is that a spillage could remain undetected on the floor of the walkway for a period of up to 40 minutes. This is based on the assumption that any such spillage is not detected or reported by a member of the public, shop staff, security staff or another one of the respondent's cleaners or a supervisor passing by. Although there was evidence that supervisors do spot checks on the cleaning staff and it can also be accepted that spills will on occasion be detected and reported by persons other than the cleaner on duty in the walkway, this does not strike me as a factor upon which the respondent can place great reliance for the adequacy of its cleaning regime. A spill might be some distance from a shop and not be noted by staff whilst cleaners, other than the one on duty in that walkway, and security staff for that matter, might simply not happen to pass by or even detect the spillage in the walkway. This would appear to have been the case when the incident in question took place. What is more if the spillage is not large or clearly visible it might remain undetected by anyone except the cleaner specifically tasked with cleaning that walkway. In the present matter the spill appeared to be small, some 5cm in length and of a brownish colour with the result that it was not clearly distinguishable against the

similarly coloured tiles on the floor.

[47] Ultimately, therefore, an important fact in evaluating the adequacy of the respondent's cleaning regime must be the time it might take for the cleaner on duty to detect a spillage. In my view, a period of up to 40 minutes is too long to leave a hazard in a walkway which is as busy as the one at the Centre and where spillages appear to be a regular occurrence. In argument, the respondent's counsel pointed out that, as far as possible, visitors from the Centre were dissuaded from consuming food other than at the food court where the 48 restaurants and outlets were situated. Experience seems to have shown however that some visitors are either unaware of these strictures or ignore them. A case in point appears to be spillages caused by ice-creams which, in the nature of thing, are often not consumed at the point of purchase but by customers on the move through the Centre.

[48] In regard to the adequacy of the cleaning regime, respondent's counsel, Ms Harvey, argued that the Court should defer to the

experience and expertise of the respondent's managers whose view it was that one cleaner per walkway was sufficient. She also emphasised that following the incident the cleaning regime had been reassessed and found not to be wanting. However, without any evidence or explanation of how the conclusion was reached that the cleaning regime was adequate, this reassessment process can carry no weight.

[49] Ms Harvey also argued that if the Court were to find that two cleaners were necessary for a walkway it would in effect be legislating for the entire cleaning industry across the country. I do not accept this proposition either. A finding that for the cleaning system in question to be adequate at least one further cleaner would have been necessary per walkway is specific to the facts of this case with regard to the foot fall, the length and width of the walkway, the time that the cleaner took to complete a cleaning cycle of the walkway and taking into account all the duties she had to perform on each cycle. It also takes into account the possibility of spillages inter alia involving food and ice-cream at the Centre in question. All these factors will differ from one shopping centre or public space to another. For example, in a similar scenario the evidence might be that a security guard constantly patrols up and down a walkway armed with a radio and would notice a spillage within five or ten minutes.

[50] For these reasons, I consider that the Court a quo erred and misdirected itself in concluding that the respondent had in place an appropriate cleaning regime. To reiterate, the main factors which drive me to this conclusion are the considerable size of the Centre and in particular its common area, the heavy traffic on the walkways of the many visitors to the Centre, the size of the walkway allocated to only one cleaner, the comparatively lengthy period of time for which a spill may remain undetected (up to 40 minutes), the large number of restaurants and food outlets in the mall and the regular spillages. The evidence also revealed a failure on the part of the respondent's management in devising an adequate cleaning programme to take into account the heavy traffic/footfall and the large area involved as well as a failure to appreciate the implications of the admitted duty of the

respondent to take reasonable steps to protect the safety of members of the public by ensuring that the floor was clean and free of any spillages.

- [51] The final leg of the appellant's argument was that even if the respondent's cleaning regime was appropriate and adequate, it had failed to prove that it was adhered to on the day in question. This argument was based on what was contended was a lack of any evidence to the effect that the cleaner on duty in the walkway in question that day had actually performed his/her duties diligently. In the light of the finding that the cleaning regime was not adequate and in the absence of any evidence that, notwithstanding the inadequacy of the cleaning regime, a cleaner had passed by the area in question a few minutes before the appellant slipped and fell, it is in my view not strictly necessary to consider this leg of the appellant's argument.
- [52] However, I do note that neither of the cleaners on duty nor their supervisor on the day testified in the trial although one such cleaner and the supervisor were presumably available to do so. Nor do I consider that any reliance can be placed on Mr Wright's reconstruction, two years after the event, of the cleaners' cycle on the day in question which he utilised to suggest that the cleaner on duty must have passed the area in front of Zoot some 10 to 15 minutes before the incident occurred. There are simply too many unfounded assumptions built into the reconstruction to make it reliable. One wonders also why the respondent did not follow its own protocols after the incident and ascertain from the cleaner on duty and record in a report, when she had last cleaned the spot where the incident took place.
- [53] In the result for these reasons I consider that the appeal must succeed and the following order is made:
1. The appeal is upheld with costs including the costs involved in the application for leave to appeal;
 2. The order made by the Court a quo is set aside and replaced with the following:

'1. The respondent is declared liable for such damages as the appellant can prove arising out of the incident which occurred on 12 January 2012 at the Canal Walk Shopping Centre when the appellant slipped and fell;

2. The respondent is to pay the appellant's costs in the trial including the qualifying expenses of Mr De Meillon'

I agree.

FORTUIN J

NUKU J

For the Appellant: Adv PA Corbett (SC)

As Instructed by: Malcolm Lyons & Brivik Inc

For the Respondent: Adv S Harvey

As Instructed by: MacGregor Erasmus Attorneys

[1] 1966 (2) SA 428 (A) at 430E-G.

[2]

[1998] 2 All SA 186 (W).

[3]

[1976] 1 All ER 219 (CA) at 224A–C (quoted *ibid* at 197).

[4] Probst above at 197.

[5] *Ibid*.

[6] *Ibid*.

[7] 2009 (4) SA 459 (SCA).

[8] *Ibid* at para 8.

[9]

[2008] ZASCA 115; 2009 (1) SA 265 (SCA).

[10] *Ibid* at para 3 [my underlining].

[11] *Ibid* at para 48.

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Prepared on 11 October 2026 · Esheria