

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NUMBER: 07/19770

In the matter between

SKEAD, DENISE

First Applicant

AUSTICK, CHERYL

Second Applicant

KELLY, JUNE

Third Applicant

and

MELCO ELEVATOR (SOUTH AFRICA) (PTY) LTD

First Respondent

LIBERTY GROUP LIMITED

Second Respondent

J U D G M E N T

JAJBHAY J:

Introduction

- [1] The appellants, who were the plaintiffs in the court below, sued the respondent for damages sustained by them on the 26th March 2006.

The damages which they suffered arose from the personal injuries they sustained when the escalator on which they were being conveyed at the Eastgate shopping centre malfunctioned.

- [2] As a result of the separation of issues in terms of Rule 33(4) of the Uniform Rules of Court, the Court below was called upon to decide whether or not the respondents' negligence was the cause of the appellants' falling and injuring themselves.

The Escalator

- [3] The escalator is a 1994 Otis GESC692 (UP) 21054B escalator ("the escalator"), which is one of the only set of Otis escalators at the Eastgate Mall. The handrail and steps of this escalator are interconnected and operate in tandem, i.e. they move together at the same speed. The handrail drive mechanism on the escalator rotates a belt known as a poly-V-belt.
- [4] On the day in question the left handrail malfunctioned. There was an initial jerk. Thereafter it continued to move. Then there was another jerk, after which it came to a complete stop. The handrail malfunctioned because the poly-V-belt was shredded and strips jammed between rollers and the roller frame of the handrail drive mechanism.

The Appellants' case

- [5] The second appellant first ascended the escalator, followed by the third appellant and directly behind her the first appellant. The first appellant was some 7 to 8 steps ahead of the other appellants. The first jerk of the handrail occurred when the second appellant was approximately 5 steps from the top of the escalator.

- [6] After the first jerk of the handrail, the third appellant, who held on to the handrail with her left hand, lost her balance but was caught and held up by the first appellant.
- [7] At the time of the second jerk of the handrail the first and third appellants fell backwards. The first appellant was caught by a man behind her and the third appellant fell on her back.
- [8] The second appellant, after the first jerk and hearing her sister (the third appellant) screaming behind her, immediately turned around on the escalator, and within a *“split second”* reached the top of the escalator where she lost her balance and fell.
- [9] The appellants sustained injuries in the process.
- [10] The appellants argued that the sole cause of the injuries they sustained was due to the negligence of employees of the first and/or second respondents, more particularly –
- [10.1] the failure of the first respondent’s employees to ensure that the escalator was properly maintained, monitored, and repaired at all times;
- [10.2] the failure of the second respondent’s employees, on behalf of the owner and occupier of the Eastgate Mall, to ensure that the escalator was fully operational and safe for use at all times.

First Respondent’s Case

- [11] The first respondent denied any negligence on its part, and pleaded in the alternative that the sole cause of any fall was due to the appellants’ own negligence for –
- [11.1] failing to keep a proper lookout;
- [11.2] failing to avoid the fall and injuries when, by the exercise of reasonable care, they could and should have done so.

Second Respondent’s Case

[12] The second respondent denied any negligence on its part and averred that –

[12.1] it did not possess the necessary skill and expertise in relation to the maintenance and repair of escalators;

[12.2] it employed the services of the first respondent, a company having the requisite expertise and skill, to maintain and repair the escalators at the Eastgate Mall in terms of a written maintenance agreement (“the maintenance agreement”);

[12.3] by contracting with the first respondent, it took all reasonable steps to guard against any injury or loss to members of the public utilising such escalators.

[13] In the alternative the second respondent pleaded that should it be found that its employees were negligent, that it denied that such negligence was the cause of the appellants falling (and injuring themselves), and that the incident was caused by the negligence of the appellants.

The evidence

Third Appellant – Mrs Kelly

[14] The third appellant, Mrs June Kelly testified that the second appellant, Cheryl Austick is her sister. The first appellant, Denise Skead is her cousin. The third and second Appellants live in Cape Town, and had come down to visit their cousin, Mrs Skead, who lives in Alberton. First Appellant had taken them by car to the Eastgate Mall. She recalls that they arrived towards the afternoon. They first had lunch at the Eastgate Mall. Thereafter, they went shopping and window shopping. She was only carrying handbag, which she carried around her neck in front of her. She was not carrying any parcels.

[15] They wanted to leave the Eastgate Mall at around 17h00. Second appellant stepped onto the escalator first, followed by third appellant and then by first appellant. Second appellant was about seven or eight steps further ahead of third appellant and first appellant. Third

appellant held onto the left handrail. As she stepped onto the escalator it was functioning normally.

- [16] The escalator moved about 4 or 5 steps. The left hand rail stopped and she felt a shudder underneath her feet. This caused her to fall forward on her knees. As she corrected herself, she felt a second shudder and this caused her to fall over backwards. First appellant at this point tried propping her up. First appellant could not hold her and she fell on her back and felt herself bumping downwards. When asked by the Court how any steps she had slid down, she answered that she was falling from halfway down. She was sliding down the steps to the bottom. As she looked back, she saw a man in a brown safari suit running up. He was like an angel. He picked her up, and helped her to the top.
- [17] As she got upstairs, she was shaking terribly. She had to hold onto the rail. Her head spun and her body was shaking. They moved to the car park entrance. When she entered the garage, she collapsed. There was an ER ambulance. She was put onto a spinal board and taken to the Bedfordview Hospital.
- [18] She testified that she received a visit from a employee of the second respondent, one Michael. He said that management had sent him up to the hospital. At that stage, she was lying on a bed and they were about to wheel her into the X-ray room. He told her that this has happened before. She testified that he had said: *"Please don't quote me. I can lose my job."* She testified that when he saw her she was alone, and that first appellant and second appellants were not with her at the time.
- [19] During cross-examination, third Appellant confirmed that the handrail had stopped dead whilst they were on the escalator. She testified that she had felt the handrail jerking, the stairs jerking and then the stairs jerked again. She could not provide any explanation as to why, nowhere in the pleadings or the pre-trial answers mention had been made of the stairs jerking. The first time any mention was made of the

stairs jerking was at the trial. Despite it being an important component of her recollection and the reason for her fall, it had never featured before until the trial date, more than three and a half years after the incident. She was asked to explain the sequence again and she reiterated that first she felt the handrail jerking and a “shudder underfoot”. This caused her to fall forwards momentarily on her knees, but as she pushed herself up, the second shudder “threw her” and she fell backwards. First appellant could not hold her and she fell backwards.

[20] When asked what the reason was that she could not stay up, she said that the left handrail was “dead”. She lost her balance on the shuddering of the steps. The second shudder of the steps is what made her fall backwards. She could not explain at all the failure to mention anything about the shuddering of the steps previously.

[21] She further alleged that as she was sliding down, first appellant moved past her. She could not explain how, under those circumstances, first appellant had descended off the escalator after her. She herself had not seen first appellant fall at any stage.

[22] She could vividly recall that she had fallen first, yet could not explain why, again in reply to a pertinent posed as part of the list of Rule 37(4) questions by both respondents during March 2007, it was alleged that *“Appellant’s cannot recall who fell first.”*

[23] She conceded under the first respondent’s cross-examination that her evidence that she “felt a shudder” may have been her perception in a crisis situation.

[24] Here it is clear that the third appellant has reconstructed the sequence of events. It was apparent from the order in which everyone alighted from the escalator after the incident (per Exhibit D), that third appellant did not slide past first appellant, as first appellant descended from the escalator after third appellant. Accordingly, the court *a quo* correctly

found that third appellant could not have slipped back as she had described.

- [25] The shuddering of the steps was clearly reconstructed evidence, as it was never pleaded by the appellants, despite pertinent questions. The appellants' case had always been that the "handrail jerked violently".

Second Appellant – Mrs Austick

- [26] The second appellant fell because she turned around, looking down the escalator which was moving upwards.
- [27] During her evidence second appellant made no mention of the so-called "previous incident" allegedly mentioned by Michael to the third appellant.
- [28] The appellants were specifically requested whether anyone of them had turned around to face down the escalator to the lower level immediately prior to the alleged incident. The answer thereto was "No". The evidence regarding video footage (Exhibit "D" in the trial court) indicated otherwise.
- [29] The Court *a quo* correctly found that the second appellant had been the author of her own misfortune.

First Appellant – Mrs Skead

- [30] When the first appellant stepped onto the escalator it was functioning normally and she held onto the left handrail. The handrail jerked and there was a shudder under her feet. It was not the jerking of the handrail which made first appellant "lose her balance" and step back on the escalator. What caused first appellant to "momentarily lose her balance" was that third appellant was leaning on her. Third Appellant was too heavy and first appellant could no longer support her own weight and that of third appellant. Throughout, she held onto the handrail and used it as a balustrade. She cut her foot just under her

toes as she stepped back onto the escalator. She remained stationary on top of the escalator landing for some time because she waited for her shoe to come back up with the escalator.

[31] She testified that as she was starting to lean backwards the man in the safari suit pushed her back upwards, and in the next instant picked up third appellant. The first appellant never fell down the escalator as had been initially alleged in the particulars of claim.

[32] First Appellant testified that all the appellants were together when the employee of the second respondent made the allegation about similar incidents on this particular escalator, as reported by third appellant.

Experts' evidence

[33] The first respondent called two expert witnesses to testify, Mr. Murray, the National Maintenance Manager of the first respondent and Mr Peyper, whose expertise as an expert in lift and escalator maintenance was not disputed.

[34] Murray explained that the handrail turns via a poly-V-belt. The driving mechanism is called a linear drive unit. The linear drive unit is driven by a gear, which is connected to a step chain. The gear which is connected to the step chain is connected to the linear drive unit. This drive mechanism ensures that the handrail and the steps move at the same speed. It is impossible for the handrail to move faster than the steps. You cannot have stationary steps and a moving handrail, but you can have moving steps and a stationary handrail, as described by the appellants. Murray testified that a poly-V-belt can last up to 8 years, although he would say that the average would be five years. Murray testified that the escalators in question were serviced more frequently than is required by the manufacturer of the escalator and more frequently than required by the statutory regulations. Murray further testified that Mr Ndlovu, the employee of the first respondent responsible for maintaining the escalators at Eastgate on behalf of the

first respondent in terms of the agreement with the second respondent was competent to do so, and that Ndlovu had obtained the requisite certificates and obtained practical knowledge to maintain the escalators.

- [35] Both experts testified that, having regard to the nature of the damage to the poly-V-belt which was inspected on 29 March 2005, it was apparent that the poly-V-belt had become shredded lengthwise into strips. The poly-V-belt began to shred because a piece of the belt's fabric became partially separated from the belt and then jammed between one of the rollers and the roller frame. Once a single piece of the poly-V-belt had become stuck between the roller and the roller frame, the belt would cease to rotate over the drive mechanism evenly. It would become trapped in other places between the roller and the roller frame, which would lead to further tearing and the ultimate destruction of the belt.
- [36] Both Murray and Peyper were in agreement that the entire process of the initial tear to the point where the handrail stopped moving completely would have taken place as one event over a period of minutes.
- [37] Their view in this regard was fortified by the fact that all three appellants were unanimous in their testimony that the handrail had been working normally as they initially got onto the escalator. There was no report that the handrail had been "slipping" and/or had felt different and/or was not moving prior to the initial "jerk".
- [38] Under those circumstances, Murray and Peyper were in agreement that the shredding of the poly-V-belt was a sudden unforeseen event of which there had been no prior warning. It would not have been picked up by either the first or the second respondent even if a handrail test (which can only be done by a competent person) had been done a minute before the event.

- [39] Both experts were in agreement that the sudden stopping of the handrail due to the shredding of the poly V-belt would not have either a) caused the steps to move faster and/or b) cause the steps to jerk or move in a strange manner in any way whatsoever. The stopping of the handrail would not have had any effect on the working of the steps whatsoever.
- [40] Both experts noted that the thickness of the poly-V-belt had been intact. Under cross-examination Murray confirmed that the depth of the belt had not been worn down. What had been impossible for him to see on 29 March 2005 was the horizontal surface of the poly-V-belt.
- [41] The fact that the thickness of the poly-V-belt had been intact would lead to the exclusion of the possibilities of ordinary wear and tear, extraordinary wear and tear and burning/melting of the poly-V-belt as an explanation for the initial tear. Murray could not say what would have led to the initial fragment coming loose from the poly-V-belt, whereas according to Peyper the most likely explanation for why the initial fragment had come loose would be a defect in the manufacture of the poly-V-belt.
- [42] Both experts were in agreement that it would not have been possible for the loose fragment of the poly-V-belt to have been there for any length of time prior to the incident. Given the movement of the poly-V-belt with reference to the length of the poly-V-belt and the number of rotations it makes to enable the handrail to turn, once a fragment became loose it would be caught between the rollers and the roller frame within a very short period of time.
- [43] They found no evidence of any water/liquid ingress into the escalator.

- [44] Murray testified that if the handrail had been slipping, it would have heated up to such an extent that it would have melted. He found that it had not melted. It had just shredded, not snapped.

Mr De Sousa

- [45] The appellants pleaded that the respondents were aware of the faulty poly-V-belt for a period of 8 months prior to the incident, based upon an entry in Exhibit B3 which reads : *“19/6/04 – V-belt damages & canvas. Switched off. Need to re-canvas h/rail & replace V-belt.”*

- [46] The first respondent called Mr Xavier de Sousa, who had made the entry in the record book pertaining to this particular escalator (JESC 692). He testified that he was on call-out duty and had been paged to attend at Eastgate. He specifically recalled that this was the up escalator. He recalls this because this particular escalator is an Otis escalator which works with a poly-V-belt (as opposed to a chain). On arrival, he had found that the handrail had stopped moving, but the escalator steps had continued to move. He therefore switched the escalator off. He found that the poly-V-belt had been worn down and the canvas was damaged. He was not the technician on site and he therefore did not replace the poly-V-belt himself.

- [47] Given that Murray and Peyper were consistent in their evidence that the thickness of the Poly V-belt which they had inspected after the incident of 26 March 2005 was intact and not “very worn down” as testified to by De Sousa, the trial court found that the Poly V-belt was replaced by Ndlovu after De Sousa’s entry of June 2004.

Mr Ndlovu

- [48] Ndlovu was called. He testified that he did replace the poly-V-belt on 22 June 2004. He was assisted by Mr Edward Monqa on 21 June 2004 to remove the canvass from the handrail. This is a time consuming process as the old canvass has to be chiselled out, they then have to apply glue (section for section not in one go) and thereafter re-apply

canvass, also section for section. They have to leave the re-applied glue and canvass to set for a day and the next day he then finished with the job and replaced the poly-V-belt. He made a note on Exhibit B3.1 that he had re-canvassed the handrail, but neglected to note, in error, that he had replaced the poly-V-belt. He was adamant that one could not replace the canvass on the handrail, without also replacing the poly-V-belt.

- [49] He referred in his evidence to his time sheet and that of Monqa at Exhibit B, p78-79, which bears on that a day's work had been done on escalator number 21054B, being the escalator in question, on 21 June 2004, by both Monqa and Ndlovu and again on 22 June 2004 by Ndlovu.

Mr Motshoari

- [50] Mr Motshoari testified that he had been on duty during the week immediately preceding the incident.
- [51] It was part of his duties to occasionally conduct a handrail check to check for slipping. In particular, if he did not have a particular job to attend to in the mornings or afternoons, he would conduct handrail checks on the escalators.

Mr Gomes

- [52] Mr Gomes testified that he had a team of 15 technical staff members working under him. His team would, as and when they were upon the escalators at Eastgate, lightly touch the handrails to feel for anything untoward (as opposed to the handrail tests which the first respondent conducted and which can only be done by competent persons), check for broken comb plates and listen for strange noises.
- [53] Gomes himself would do the exact same as and when he was on an escalator and would specifically do these checks on each and every escalator Friday afternoons after lunch, before he left for the week-end.

- [54] Over week-ends and public holidays a technician would be on duty as well as a duty manager and/or supervisor. They would do the same “informal checks” as and when they were on the escalators.
- [55] The second respondent's staff members were not allowed to work on the escalators in any way. They were merely “the eyes and ears” of the first respondent and would immediately report a malfunction to the first respondent and/or switch off an escalator, depending on the seriousness of the malfunction.
- [56] Gomes was on leave during the week-end that the incident occurred.

Onus

- [57] The appellants appear to be of the view that because the trial court had dismissed the application for absolution by the respondents after the close of the Appellants' case, that a) the maxim *res ipsa loquitur* finds application and consequently that b) the onus to disprove negligence shifted to the respondents. The proposition is incorrect in law.
- [58] Given that the respondents denied negligence as alleged by the appellants, the appellants retained the onus to prove the allegations of negligence. The second respondent is not required to “confess and avoid” the denial of negligence. Furthermore, the content of expert summaries aimed at disproving negligence does not require to be pleaded, as is proposed in the appellant's heads of argument.
- [59] In the *locus classicus* case of Arthur v Bezuidenhout & Mieny ¹ Ogilvie Thompson JA held as follows:
- “There is only one inquiry: namely, has the Appellant, having regard to all the evidence in the case, discharged the burden of proving on*

¹ 1962 (2) SA 566 (A). See also *Monteoli v Woolworths* 2000 (4) SA 735 (W) 742C-G.

a balance of probabilities the negligence he averred against the Respondent?”²

[60] As stated by Erasmus J in MacLeod v Rens:³

“As a particular form of inferential reasoning, res ipsa loquitur requires careful handling. It is not a doctrine, as it is sometimes referred to. It propounds no principle and is therefore strictly speaking not even a maxim. What it does do is pithily state a method of reasoning for the particular circumstance where the only available evidence is that of the accident. It boils down to the notion that in a proper case it can be self-evident that the accident was caused by the negligence of the person in control of the object involved in the accident. As such it is not a magic formula. It does not permit the Court to side-step or gloss over a deficiency in the plaintiff's evidence; it is no short cut to a finding of negligence: these are real dangers in the application of the expression. It seems to tempt Courts into speculation. Expressions such as “in ordinary human experience”, “common sense dictates”, and “obviously, which are regularly employed in reasoning along the lines of the maxim, sometimes only serve to disguise conjecture”⁴

[61] Further, in Administrator Natal v Stanley⁵ the Court held:

“If the facts are sufficiently known, the question ceases to be one where the facts speak for themselves, and the solution is to be found in determining whether on the facts established, negligence is to be inferred or not.”⁶

² At 574.

³ 1997 (3) SA 1039.

⁴ At 1048E/F-H/I.

⁵ 1960 (1) SA 690 (A).

⁶ At 700. In *Hamilton v MacKinnon* 1935 AD 114 where the court found that where there are several possibilities which can give rise to an innocent cause of death, than an inference of negligence could not be made in the circumstances. The same argument applies *in casu*. See also *Ocean Accident and Guarantee Corporation Ltd v Koch* 1963 (4) SA 147 (A).

[62] It is quite clear, however, that the issue in the trial was whether or not the evidence as a whole justified the inference that the respondent was negligent. It is absolutely trite that the *onus* of proving negligence on a balance of probabilities rests with the plaintiff. (See, for example, *Arthur v Bezuidenhout and Mieny* 1962 (2) SA 566 at 574H and 576G; *Sardi and Others v Standard and General Insurance Co Ltd* 1977 (3) SA 776 (A) at 780C-H and *Madyosi and Another v SA Eagle Insurance Co Ltd* 1990 (3) SA 442 (A) at 444D-G.) Sometimes, however, a plaintiff is not in a position to produce evidence on a particular aspect. Less evidence will suffice to establish a *prima facie* case where the matter is peculiarly in the knowledge of the defendant. (See, for example, *Union Government (Minister of Railways) v Sykes* 1913 AD 156 at 173-4; *Gericke v Sack* 1978 (1) SA 821 (A) at 827D-H and *Macu v Du Toit en 'n Ander* 1983 (4) SA 629 (A) at 649B-650F.) In such situations, the law places an evidentiary burden upon the defendant to show what steps were taken to comply with the standards to be expected. The *onus* nevertheless remains with the plaintiff. (See, for example, *Ex parte Minister of Justice: in re R v Jacobson and Levy* 1931 AS 466 at 473; *Durban City Council v SA Board Mills Ltd* 1961 (3) SA 397 (A) at 404C-405A; *Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 37A-38G.) It is my understanding of the law that the maxim of *res ipsa loquitur* can only come into operation where an inference is at least suggested from the evidence produced. (See, for example, *Naude NO v Transvaal Boot & Shoe Manufacturing Co* 1948 AD 379 at 392-3 and 398-9.) The maxim does not place any *onus* on the defendant to explain or rebut anything. (See, for example, *Arthur v Bezuidenhout and Mieny* (*supra* at 574A-576G).)

[63] In my view, the facts do not establish or raise the inference that the respondents' turned a "cold shoulder" to the safety of the public by the continuous use of the escalator under the prevailing circumstances.

The malfunction

- [64] A strand came loose from the poly-V-belt and snagged. This caused the belt to tear lengthwise along its grooves, ultimately reducing it to “spaghetti”. In this state it could not drive the handrail, which stopped. Whilst shredding the belt may have regained friction momentarily, causing the handrail to stop, then to start moving again and then to stop finally.
- [65] The steps of the escalator did not shudder or jerk. All that happened was that the handrail stopped, then moved again, then stopped.
- [66] The evidence also established that the destruction of the belt occurred over a very short space of time from the dislodgement or separation of the strand until final destruction of the belt. In this regard the confined space of the drive unit makes it unlikely that a loose strand would move around the belt for long without snagging (Peyper estimated that snagging would occur within three to four rotations of the V-belt). The V-belt is 1 to 1.2 metres in circumference. Therefore within 3 to 3.5 metres of movement of the handrail the strand would be likely to snag.
- [67] The width of the V-belt is approximately 500mm. Therefore once lengthwise stripping down the internal grooves commences, the entire belt is destroyed within a handful of rotations.
- [68] The third appellant testified that the handrail was functioning properly when she stepped onto the escalator, but during her journey it came to a complete stop.

Causation

- [69] The causation enquiry requires the elimination of the first respondent’s actual conduct and the substitution of a different cause of conduct in its stead. The enquiry is whether, imagining the different cause of conduct to have been taken, the malfunction probably would not have taken place. If it would have occurred anyway, then the actual conduct is not the factual cause of the accident.

- [70] Peyper testified that if a competent person had performed a hand test on the left hand side handrail of the escalator in question one minute before the incident, such hand test would not have revealed that anything was amiss.
- [71] Likewise, a visual inspection of the poly-V-belt at any time before the strand broke free would not have prompted a technician to replace the poly-V-belt, because the rubber on the belt was still thick.
- [72] The average lifespan of a poly-V-belt is about three years. The belt destroyed in this incident was only nine months old, the shortest surviving V-belt in Murray's experience.
- [73] Murray testified that there were no signs of melting on the destroyed V-belt. It may be inferred that there was no prolonged slipping before the belt was destroyed.
- [74] Peyper said that the coming loose of a strand was an extraordinary, unexpected occurrence. This was the only V-belt that he had seen shredded in this way. Likewise Murray had never seen another V-belt shredded in this way.
- [75] In Peyper's view a defect in the V-belt was the probable explanation for a strand having come loose. This conclusion is supported by and is consistent with all of the objective facts.
- [76] The court a quo rightly accepted Peyper's opinion, and accordingly concluded that the cause of the malfunction was "an unforeseen and unexpected failure of the belt when a thread snagged and led to its disintegration".

- [77] The appellants' competing hypothesis is that a strand came loose because the V-belt had worn so thin that the canvas had become exposed.
- [78] There are no substantial reasons for the court a quo to have rejected the evidence of any one of these witnesses, let alone to have rejected the evidence of each one of them.
- [79] There are no objective facts in evidence that support the appellants' hypothesis.
- [80] There is a distinction between an inference based on an objective fact and a purported inference based on an assumption not based on facts. No inference can be drawn unless there are objective facts from which to infer the other facts sought to be established.
- [81] The appellants called no expert witness to counter the evidence of Peyper and Murray (despite having delivered notice of their intention to call one Willem du Toit). They called no factual witness to describe the general condition and maintenance of the escalators at Eastgate.
- [82] The appellants failed to establish any causal link between the malfunction and any act or omission on the part of the first respondent. The court a quo rightly found that there was no such link, and on this ground alone the appeal fails.

Appellants' case regarding negligence

- [83] The trite test for negligence was formulated in **Kruger v Coetzee** 1966 (2) SA 428 (A) at 430E-G and still applies.
- [84] *"Once it is established that a reasonable man would have foreseen a possibility of harm, the question arises whether he would have taken measures to prevent the occurrence of the foreseeable harm. The answer depends on the circumstances of the case. There are, however, four basic considerations in each case which influence the*

reaction of a reasonable man in a situation posing a foreseeable risk of harm to others:

(a) The degree or extent of the risk created by the actor's conduct;

(b) The gravity of the possible consequences if the risk of harm materialises;

(c) The utility of the actor's conduct; and

(d) The burden of eliminating the risk of harm."

(Ngubane v South African Transport Services 1991 (1) SA 756 (AD) at 776G-I)

[85] The evidence in this matter established that the Eastgate Mall was an extremely busy and popular shopping centre, frequented by members of the public well beyond the normal working hours. The evidence further established that due to the fact that the Eastgate Mall was so busy the first respondent ensured "a *presence*" of employees at the Mall at all times during normal working hours.

[86] In **Lindsay v Checkers Supermarket** 2008 (4) SA 634 (NPD) at 638E-H, a customer slipped on an oily substance on a supermarket floor. The Court found that the emphasis on the length of time the spillage remained undetected without consideration of the adequacy of the cleaning system is an artificial and unrealistic test. The Court held that certain shopping areas in a supermarket require more vigilant supervision and cleaning of spillages, and therefore the adequacy of the system also has to be considered against the number of cleaning staff allocated to deal with spillages and the floor area and number of shopping isles. It is submitted that the evidence in *casu* similarly established an inadequate maintenance and monitoring systems implemented by the respondents (See also **Minister of Safety and Security v Van Duivenboden** 2002 (6) SA 431 (SCA) at 448F-G).

[87] In order to determine what would constitute reasonable steps to guard against an occurrence such as the one in question, will depend upon what can reasonably be expected in the circumstances of the particular

case (**Minister of Safety and Security v Van Duivenboden** 2002 (6) SA 431 (SCA) at 448F-G).

- [88] In the ultimate analysis the true criteria for determining negligence is whether in the particular circumstances the conduct complained of falls short of the standard of the reasonable person. By dividing the enquiry into various stages is no more than an aid or guideline for resolving this issue. There can be no universally applicable formula which will prove to be appropriate in every case (**Minister of Safety and Security and Another v Carmichaele** 2004 (3) SA 305 (SCA) at 325C-D and **Sea Harvest Corporation (Pty) Ltd and Another v Duncan Dock Cold Storage (Pty) Ltd and Another** 2000 (1) SA 827 (SCA), paras 21-22 at 838I-840G).
- [89] While the precise or exact manner in which the harm occurs need not be foreseeable, the general manner of its occurrence must indeed be reasonably foreseeable (**Carmichaele** case *supra* at 325B-E and **Sea Harvest Corporation** case *supra* at 839H-840G).
- [90] Here, the negligence was not established in respect of both respondents.
- [91] The Court *a quo* was correct in finding that the V-belt was replaced on 21 or 22 June 2004 by Petrus Ndlovu. This was his direct evidence – Xavier de Sousa remembers the call out on 19 June 2004 (which was a Saturday and therefore out of the ordinary, and also pertained to the only escalator at Eastgate having a v-belt). He remembered that he found the v-belt very thin and worn. He said in that condition it could never drive the handrail. He found the escalator on i.e. with the steps moving and the handrail drive unit turning but with the handrail not turning. It is inconceivable that the same belt could have continued to drive the handrail for a further nine months when it was already incapable of doing so on 19 June 2004.

[92] Despite the appellants' assertions to the contrary the evidence of Ndlovu in regard to the replacement of the poly V-belt on 22 June 2004 accords with the probabilities and the documentation in support of the probabilities:

[92.1] De Sousa found a poly V-belt that was very worn down on 19 June 2004, whereas Peyper and Murray were unanimous (and uncontested) that they found a poly V-belt on 29 March 2005, the thickness of which was intact.

[92.2] De Sousa found that the handrail had stopped moving on 19 June 2004, which is why he had switched off the escalator. The appellants had testified that the handrail was moving when they got onto the escalator on 26 March 2005. The handrail could not have moved and/or continued to move between 19 June 2004 and 26 March 2005 unless it had been replaced.

[92.3] The handrails were checked according to the Annexure "C" certificate produced by WAC projects on 1 February 2005 (Exhibit B, p80-81) and nothing untoward was noted on that occasion.

[92.4] Exhibit B, pages 78-79 bears out that work was done of a considerable length of time on 21 and 22 June 2004.

[92.5] The trial court correctly found that, both on the probabilities and on the evidence of De Sousa, Ndlovu, Peyper and Murray that the poly V-belt had indeed been replaced after 19 June 2004, contrary to the Appellants' assertion in the pleadings and during cross-examination to the contrary. In particular, the trial court correctly held that corroboration for this evidence was found in the fact

that the belt was working properly immediately prior to the incident according to the Appellants' evidence.

WAC AUDIT REPORTS

- [93] The Appellants have sought to make out a "general case of lack of maintenance" with reference to the WAC audit report.
- [94] It is noteworthy that the specific complaints relate to another escalator – number JESC 361, manufacturer number 21059B - with reference to for example the knocking noise and reference to the right hand side handrail being damaged, which items were carried over from a previous report. To that extent, it is similar fact evidence of the most irrelevant nature.
- [95] In addition, both Murray and Peyper testified that there is nothing contained in the WAC audit report of 7 February 2005 pertaining to this particular escalator which would call for immediate action and/or pose any danger to the public in the use of this particular escalator. Gomes and Murray made it clear in their evidence that the inferences sought to be drawn by the Appellants were not apparent from the WAC audit reports, i.e. it could not be said that the knocking noise referred to in the audit of March 2002 was the same as that referred to in February 2005. Gomes further testified that it was not apparent whether the damage to the handrail was internal or external. He further testified that he would take up issues arising from a WAC audit with Murray if the need arose, without any paperwork. This accords with the evidence of Murray.
- [96] The attempt to prove a "pattern of lack of maintenance" with reference to the WAC audit reports was not borne out by the evidence. Had the appellants been serious in their contentions in this regard, they would have been at liberty to subpoena and call as witnesses the authors of the two WAC reports, which they failed to do. To introduce similar fact evidence of this nature, the appellants would have to prove: i) a high

degree of relevance ii) that the evidence sought to be tendered was “reasonably conclusive” and iii) that it would not raise difficult collateral issues. The appellants did not prove a “pattern of lack of maintenance”. No evidentiary basis was laid by the appellants for an inference of negligence based on the content of the WAC reports pertaining to other escalators. In particular, such an inference would be contrary to the direct evidence given by the witnesses called by the first and second respondent.

SPECULATIVE SIMILAR FACT EVIDENCE REGARDING A “PRIOR INCIDENT/S”

[97] Third appellant and first appellant testified that Michael, the employee of the second respondent had allegedly told them “this had happened before”. This threadbare evidence is used a basis to contend for an adverse inference to be drawn against the second respondent for failing to call Michael Sibanda.

[98] The third appellant had testified that she was alone when this was allegedly said to her. It is clear that she had reconstructed most of her evidence. Contrary to the third appellant, the first appellant had testified that all three the appellants were together when this was allegedly mentioned to them. The second appellant did not give any evidence to this effect. Consequently, there was no consistency in regard to this alleged conversation between the appellants.

[99] Murray who, as Maintenance Manager of the first respondent is responsible for submitting the relevant reports in terms of the Occupational Health and Safety Act to the Department of Labour testified that to his knowledge, there had been no other similar incidents (where someone was injured) on this particular escalator. Although the appellant’s counsel was given the opportunity to re-cross-examine Murray, his testimony in this regard was not challenged.

[100] The Appellants argue for an adverse inference to be drawn against the Second Respondent for the failure to call Sibanda on the strength of

Elgin Fireclays Limited v Webb.⁷ The judgment in Elgin makes it abundantly clear that “...*the inference is only a proper one if the evidence is available and if it would elucidate the facts.*”⁸ It is certainly not a proper inference where what the Appellants sought to establish was similar fact evidence of the most irrelevant kind. In any event, Murray’s direct evidence in this regard put paid to any speculation of this nature.

THE CASE AGAINST THE SECOND RESPONDENT

[101] The appellants do not dispute that the first respondent has the requisite skill and expertise to maintain and repair the escalators at the second respondent’s Eastgate shopping centre.

[102] The second respondent does not have the requisite skill and expertise to maintain and repair the escalators at the Eastgate Shopping Mall. It is legally not entitled to touch the escalators and/or do any work on the escalators. This was not challenged on the evidence.

[103] The second respondent specifically pleaded that in contracting with the first respondent, it took all reasonable steps to guard against any injury or loss to members of the public utilizing the escalators.

[104] Given the uncontested evidence of Murray and Peyper as to the precise cause for the handrail stopping suddenly on 26 March 2005, and more particularly the fact that it was a sudden unforeseen event that would have unfolded within minutes, which was unusual and which even a handrail test by a competent person one minute before the event would not have picked up, does not point to any negligence on the part of either the first or the second respondent.

⁷ 1947 (4) SA 744 (A) at 750. See also *Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd* 1979 (1) SA 621 (A) at 624 D-G.

⁸ *Supra*.

[105] The appellants contend that the handrail “must have been slipping” sometime during the week before the incident and that if it had been slipping “it should have been picked up” by either of the respondents. Both experts testified that in light of the appellants’ unanimous evidence that the handrail had been working as they got onto the escalator on 26 March 2005, this theory was untenable.

[106] In Langley Fox Building Partnership (Pty) Ltd v De Valence⁹ it was recognised that the existence of a duty upon an employer of an independent contractor to take steps to prevent harm to members of the public will depend upon the facts of each case. The relevant factors which would necessitate consideration would include:

- [106.1] the nature of the danger;
- [106.2] The context in which the danger may arise;
- [106.3] the degree of expertise available to the employer and the
- [106.4] independent contractor respectively; and
- [106.5] the means available to the employer to avert the danger.

[107] In the present matter, this was not a situation, such as found in Langley where there is an apparent danger, which the second respondent would have been able to guard against.

[108] The second respondent engaged the first respondent to conduct monthly maintenance of its escalators at the Eastgate Shopping Centre. In addition, the first respondent maintained a presence at the Eastgate Shopping Centre during weekdays, Monday to Fridays. This it was not contractually obliged to do. It elected to do so. Murray agreed that this election by the first respondent to go beyond what was required of it, accrued to the benefit of the second respondent.

[109] The agreement also provided for a 24 hour call-back service. It is self-evident from the record book that the call-back service was being used

⁹ 1991 (1) SA 1 (A).

by the second respondent and reacted to with reasonable promptitude by the first respondent.¹⁰

[110] Murray testified that the staff on the second respondent's premises conducted daily handrail tests, which is a particular test which can only be done by a competent person. This was corroborated by Ndlovu. Whilst Ndlovu was not on duty during that week, Motshoari testified that he did the handrail tests "occasionally" and particularly, after the morning or afternoon if he had no particular job to attend to.

[111] Peyper testified that, given the particular circumstances of how the handrail came to stop functioning, a handrail test a minute before the event would not have detected the problem.

[112] Murray testified that the shredding of the poly-V-belt would literally have taken a very short time and that there had been no prior indication that the belt was going to shred itself.

[113] Murray further testified that the second respondent was not slack in notifying the first respondent in the event that there was a problem. This is clearly borne out by the content of the record book (Exhibit "B", p3¹¹) and the specific events of 26 March 2005 which reflect that immediately when there was a problem, the first respondent was notified and was on the premises by 18h08. It is also clear from Exhibit B, pages 83-87¹², that there had been an immediate recordal of the events and that the appellants details and their version of events had been recorded on the day of the incident by the second respondent's employee. There is therefore no indication of a "system failure" simply because it was a long week-end.

¹⁰ 19 June 2004 entry (on a Saturday) and the incident itself on 26 March 2005, which was also a Saturday, with the preceding Friday, 25 March 2005 having been Good Friday.

¹¹ Vol 9, p885.

¹² Vol 9, p926-930.

- [114] Gomes, the Technical Manager of the second respondent at the time, testified that he was satisfied with the maintenance and service levels received from the first respondent. In addition, their presence on site ensured a far more speedy reaction and far less down times.
- [115] The second respondent also appointed WAC projects as independent lift inspectors to conduct the 3 yearly comprehensive report required by Regulation 5(1) of Exhibit B, p106. Both Murray and Gomes testified that this constituted a type of cross-check on the work conducted by the First Respondent, as maintenance contractor. The most recent audit report of February 2005 did not bring to light anything that required either of the Respondents' immediate attention in regard to either this escalator or any of the other escalators (See Exhibit B, p81: nothing noted under C.6.a "immediately"), nor was anything highlighted which would constitute a danger to the public in the use of this particular escalator.
- [116] Gomes had a team of 15 technical people working under him. They would conduct "informal checks" on the escalators as and when they were on the escalators. This would comprise holding the handrail lightly to feel for anything out of the ordinary¹³, checking for broken comb plates and listening for unusual noise. In the event that something was found, they would either contact the second respondent, or contact Gomes who would then call the second respondent.
- [117] Gomes himself would, in his capacity as technical manager, also conducts the same informal checks as and when he found himself on an escalator. He would also make a point of checking each and every escalator on a Friday afternoon after lunch, before he left for the week-end.

¹³ This is very different from the handrail tests testified to by Murray, Peyper and Ndlovu, which can only be conducted by competent persons with at least 5 years' experience.

[118] He was not on duty that week-end, but there would have been a technical person on duty over a week-end as well as a duty manager. These persons would also do informal checks as and when they were on the escalators. The Liberty staff, security guards and members of the public were entitled to switch off an escalator in case of emergency. However, once an escalator had been switched off, it could only be switched back on by the first respondent, once the problem had been attended to.

[119] The evidence does not establish that a dangerous situation had been created for members of the public such as the appellants, of which the second respondent had been aware or ought to have been aware of prior to the incident occurring. A comprehensive system of maintenance was established, with this particular escalator's handrails having been checked by WAC on 1 February 2005 and again by Ndlovu, as part of the monthly maintenance cycle, on 28 February 2005. WAC had not recorded anything untoward on 1 February 2005 in regard to the working of the handrails. Routine maintenance was conducted on 28 February 2005. The next routine maintenance would've been required only on 28 March 2005, the handrails and their functioning having been checked twice in February 2005 (excluding the daily handrail checks by Ndlovu) and the ordinary checks which would have been conducted by the second respondent's technical staff and Gomes personally as and when they got onto the escalators.

[120] The appellants appear to contend for an interpretation that the handrail must have been slipping some time during that week before the incident and that this had simply not been picked up by either of the respondents. The expert evidence of both Murray and Peyper militate against such an interpretation. The appellants' evidence that the handrails were functioning normally as they got onto the escalators that afternoon, the fact that there are no records indicating any slipping point to the probabilities that no such slipping occurred during that week.

[121] The speculation appears to be based on a paragraph in Peyper's report of 29 March 2005, which he describes not only as "standard to all his reports", but which he also clarified as being a most unlikely probability having heard the appellants' evidence that the handrail had been working as they got onto the escalator.

[122] The speculative theory was not established on a balance of probabilities. And certainly does not provide any basis for a finding that there was a general lack of maintenance and/or a failure to maintain the escalator in question by either of the respondents.

Conclusion

[123] I am satisfied that given the evidence of Peyper and Murray, that there was no way in which a reasonable person, in the position of the respondents, would have been able to take any more steps than they had to prevent the incident of 26 March 2005. No amount of reasonable preventative maintenance would have been able to prevent the poly-V-belt from shredding in the manner that it did. The evidence as to the system of reasonable preventative maintenance in place was not contradicted in any way by the appellants.

[124] Murray and Peyper were in agreement that the occurrence of this particular incident could not have been foreseen or prevented, given the manner in which it had occurred and the time frame within which it had occurred. Peyper testified that a handrail test by a competent person a minute before the incident would not have led to the detection of the problem with the poly V-belt (that a shard/fragment had become loose). Monteoli v Woolworths¹⁴:

*"Within the constraints of reasonable prudence, these systems would, ordinarily, be more than adequate. It is clear that the Courts must avoid establishing an unrealistic and impossible standard."*¹⁵

¹⁴ 2000 (4) SA 735 (W).

¹⁵ *Supra*, at 744-745, para 45.

- [125] The law does not require an impossible standard from either of the respondents, nor does it make extravagant demands upon the second respondent as property owner under these circumstances.¹⁶
- [126] The sudden stopping of the handrail was not a dangerous situation of which the respondents were aware for any considerable length of time and which they failed to do anything about. Despite the comprehensive system of preventative maintenance in place, it was a sudden unforeseen event which would not have been detected even had a handrail test been conducted a minute before it had occurred.
- [127] The court *a quo* correctly found that the second respondent was unable to perform visual internal checks. It is legally not permitted to do any work on the escalators as it does not have the necessary expertise to do so. Further, the court *a quo* correctly found that external handrail checks would have revealed nothing wrong and that the second respondent's normal external checks would probably have revealed no warning signs of the impending events.¹⁷
- [128] Both experts were in agreement that it would be manifestly unreasonable if not totally impractical to expect either of the respondents to have someone on the escalators to check for potential problems every minute of every day.
- [129] The evidence indicated that the second respondent had appointed the first respondent, an entity which would be regarded as a skilled and qualified entity to maintain the escalators. Further, the evidence revealed that there was a comprehensive maintenance system in place comprising not only that the first respondent was on site (excluding holidays and week-ends), but exceeding the requirements of the manufacturer and any statutory requirements. The evidence of Gomes

¹⁶ Hammerstrand v Pretoria Municipality 1913 TPD 374 at 377.

¹⁷ Vol. 12, p1238, para 80.

further established that, notwithstanding the above, an independent contractor had been appointed to check on the work of the first respondent and that Gomes' team also checked the escalators externally.

[130] Here, the dictum in Rhodes Fruit Farms Ltd v Cape Town City Council¹⁸ finds application:

"It is the duty of the employer to take such precautions as a reasonable person would take in the circumstances. I do not, however, consider B Dukes' case as an authority for the proposition that the employment of a skilled independent contractor, where the extent of the danger and the reasonably practical measures to minimise it can only be determined by such skilled person, cannot in any circumstances constitute a discharge of the employer's aforesaid duty. . . .

There may well be situations in which a reasonable person would rely solely on an independent skilled contractor to take all reasonable precautions to eliminate or minimise damage to another, and in such circumstances it could not be said that he was negligent if such contractor fails to act reasonably.

*In my opinion, therefore, the duty to take care where the work undertaken is per se dangerous could in some cases be discharged by delegating its performance to an expert."*¹⁹

[131] In light of the above circumstances, I propose that the decision of the court *a quo* be upheld and that all three of the appellants' claims against the first and second respondents fall to be dismissed with costs, the appellants' having failed to discharge the onus of proving negligence as against the first and second respondents on a balance of probabilities in relation to the incident which occurred on 26 March 2005.

¹⁸ 1968 (3) SA 514 (C).

¹⁹ At 519. Quoted with approval in *Langley Fox Building Partnership (Pty) Ltd v De Valence* 1991 (1) SA 1 (A) and *Chartaprops 16 (Pty) Ltd v Silberman* 2009 (1) SA 265 (SCA) at 273A-D.

JAJBHAY J
Judge of the High Court

I AGREE,

MBHA J
Judge of the High Court

I AGREE.

MATHOPO J
Judge of the High Court

Date of Hearing	:	1 March 2010
Date of Judgment	:	3 March 2010
For Appellants	:	Adv. Strydom
For First Respondent	:	Adv. Lamplough
For Second Respondent	:	Adv. Goedhart