

Not Reportable

**IN THE HIGH COURT OF SOUTH AFRICA  
EASTERN CAPE LOCAL DIVISION: PORT ELIZABETH**

**CASE NO. 2740/2014**

Date heard: 18 February 2016

Date handed down: 5 May 2016

**In the matter between:**

**GIDEON KEMP**

**Plaintiff**

**And**

**SHOPRITE CHECKERS (PTY) LTD**

**t / a SHOPRITE DESPATCH**

**Defendant**

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**JUDGMENT**

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**RENQE AJ:**

*Introduction:*

[1] The plaintiff, Mr Gideon Kemp instituted an action against the defendant, Shoprite Checkers (PTY) LTD t/a Shoprite Despatch for delictual damages arising from an incident which occurred on 7

December 2011 when the plaintiff slipped and fell on the floor at the butchery section of the defendant's store.

- [2] At the commencement of the trial the parties were *ad idem* that it would be prudent that the question of liability first to be determined and that the quantum of the plaintiff's damages be left over for a later determination should a need arise to do so. Consequently, I was requested by the parties at the commencement of the trial to order a separation of these issues and I made an order accordingly.

Parties:

- [3] The Plaintiff was, at the time of the incident employed by Bidvest Magnum Security (Magnum) as a security guard and was working at the defendant's store in accordance with a contract between the defendant and Magnum.
- [4] The defendant is a company registered in terms of the Company Laws of South Africa carrying on business as a retail store at Dr Rabie Street, Despatch.

Background:

- [5] The facts and circumstances out of which plaintiff's claim arose may be briefly stated as follows:
- [6] On 7 December 2011 at the defendant's store, the plaintiff was called upon by one floor manager in the defendant's employ to render security services at the receiving gate in the butchery

section of the defendant's store. When the plaintiff arrived at the landing area of the butchery section he slipped and fell to the floor. As a result thereof he suffered injuries and on 21 August 2014 instituted an action against the defendant by virtue of it being in control of its store. Consequently, the plaintiff asserted that the defendant owed a duty of care to prevent dangerous situation arising on its premises which could harm or injure third parties. The following documentary evidence was, by agreement between the parties placed before the trial court:

- (i) Exhibit A, the sketch plan depicting the layout of the defendant's store,
- (ii) Exhibit B, photographs taken at the scene of the accident depicting butchery section of the defendant

Testimony of the parties:

[7] The plaintiff testified that on the day of the incident he was instructed by the floor manager who was on duty to fetch the keys for the butchery receiving gate from the manager's office. As he arrived at the landing area of the butchery section at the top of the stairs, he slipped, fell and rolled down the steps finally landing on the third steps. When he stood up, he felt a fatty and watery substance on his hands, pants and jersey all of which were wet. He proceeded to open the receiving gate and then returned to the steps to investigate what had caused him to slip. Upon reaching the

third step, and on closer inspection, he observed tinny pieces of fat and watery substance.

[8] The defendant called one witness, Mr Eric Middelkamp who testified that on the day of the incident, he received a message that there was meat to be delivered. He then collected the keys and walked together with the plaintiff to the butchery section. The plaintiff remained at the top of the landing area, whilst he walked down the stairs and opened the receiving gate. He denied that it was the plaintiff who opened the receiving gate. He further denied that there was any tinny pieces of fat and watery substance on the stairs as alleged by the plaintiff. Mr Middelkamp further testified that he almost fell on the stairs on a previous occasion and whilst he was still in the process of warning the plaintiff about the risk of slipping, the plaintiff fell. He did not know what had caused the plaintiff to slip and fall. He testified further that when he almost fell previously it was not because of the slippery floor. Rather he had accidentally hooked on a protruding object and grabbed the railing, which prevented him from falling to the stairs.

[9] The plaintiff disputed Mr Middelkamp's version and reiterated that he was the one who had collected and signed for the keys and thereafter opened the receiving gate.

[10] Mr Middelkamp testified that photo 4 which appears in Exhibit B depicts that the tiles on the top steps slope downwards. He further

testified that indeed there were tinny pieces of fat on the stairs which, in the normal course would slide down the drain and become absorbed by a filter which the defendant would pull and clean out.

[11] Mr Middelkamp further testified that:

- (i) the butchery section gets cleaned as and when there is spillage on the floor. During cross-examination he confirmed that in the process of making sausages, they use minced meat and pieces of fat and it could be expected that those fats might fall onto the floor. He further confirmed that fluid, water or blood could also fall onto the floor and that when this occurs the floor could well be wet and slippery and this create a dangerous situation because of the downward slope on the stairs.
- (ii) he was busy on the morning of the incident and confirmed that he could not say what actually transpired in the butchery section before he went there as his attention and effort were directed at the front area of the butchery.

Issues to be decided:

[12] The question that must be determined by this court is whether or not the plaintiff suffered injuries as a result of the defendant's negligence. Furthermore, whether or not the defendant was aware of the existence of a potential danger and whether he took any

precautionary measures to prevent the risk of harm to others. There are two conflicting versions that the court has to deal with in order to determine whether the defendant was negligent, I shall return to this topic later.

Analysis and findings:

[13] The test for the imposition of liability for negligence has been authoritatively stated in *Kruger v Coetzee 1966 (2) SA 428 (A)* at 430 E-G. There the court said:

“For the purposes of liability culpa arises if-

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

[14] It is necessary to consider the contentions made by the parties in their pleadings. Initially the plaintiff asserted in his particulars of claim that he slipped as a result of water left unattended on the floor. He later filed an amendment and alleged that he fell as result of ‘mixture of fatty pieces and /or fatty substance and/ or water left unattended on the floor’. Counsel for the defendant made an issue about this amendment, suggesting that plaintiff was not certain of the exact nature of the substance that was on the floor. It

is not unusual that when one gives instruction to ones legal representative to institute an action, they rarely get an opportunity to check whether the information that is contained in the particulars claim was accurately captured. Therefore, I do not have any qualms with the fact that there were amendments made in the particulars of claim.

[15] If regard is had to the defendant's plea, as amended, the defendant's disputes the plaintiff's claim on the following broad basis;

(i) That the plaintiff ,injured himself in the butchery section of the store where public is not allowed and that due to the nature of the butchery activities conducted therein it was expected that hazards may present themselves requiring extra care from those entering the area.

(ii) That the plaintiff was verbally warned to take care when traversing the steps where he fell.

(iii) That the plaintiff by virtue of his employment, at the defendant's store was aware or ought reasonably to have been aware of possibility of water or similar substance, spillage in the area.

[16] With regard to the issue of the public not being allowed in the butchery section, this argument is, in my view unsustainable as it is

common cause that the plaintiff was on duty on the day of incident and was given express instructions to attend to the delivery, which in terms of the defendant's own rules must be done in the presence of a security guard. Furthermore, the plaintiff was in the company of the defendant's manager.

[17] Turning attention to the issue of the warning about which Mr Middelkamp testified that the plaintiff fell while he was still in a process warning him about the possibility of falling. Furthermore, the defendant admitted that there were no warning signs at all in the area. It can therefore be concluded that the plaintiff was not warned prior to him walking down the stairs as alleged in the defendant's plea.

[18] The last issue raised was that the plaintiff ought to have reasonably been aware of possibility of water or similar spillage in the area. This is questionable as there would have been no way that the plaintiff could have been aware of the potential hazards in the area as it was his first time to carry out instruction in the butchery section.

[19] In now deal with the two conflicting versions of the plaintiff and the defendant's witness, Mr Middelkamp. When faced with the two conflicting versions, a trial court is enjoined to examine the reliability and the credibility of the witnesses. Paramount in this regard would be the consistency of each witness and where

appropriate draw inferences in the light of inherent probability and improbabilities. The technique used to resolve two mutually exclusive versions was restated and explained in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell Et Cie & Others 2003 (1) SA 11 (SCA)*, There the Supreme Court of Appeal said at D-H:

(‘The technique generally employed by the courts in resolving factual disputes of this nature may conveniently be summarized as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court’s finding on the credibility of a particular witness will depend on its impression veracity of the witness. That in turn will depend on a variety of the subsidiary factors , not necessarily in order of importance , such as (i) the witness’ candour and demeanor in the witness box , (ii) his bias , latent and blatant (iii) internal contradictions in his evidence, (iv) external factors with what was pleaded or put on his behalf , or with established facts or with his own extracurial statements or actions (v) the probability or improbability of particular aspect of his version, (v) the caliber and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to the (b), a witness’ reliability will depend, apart from the factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party’s version on each disputed issues. In the light of this assessment of (a) (b) and (c) the court will then, as final step, determine whether the party burdened with the onus of proof has succeeded in discharging it’).

[20] There were numerous inconsistencies that were manifest in Mr Middelkamp's evidence. I will mention the most material ones, namely;

(i) *Access to the keys*: during cross-examination he said that if a person is not a manager, he would not be allowed to sign for the keys.<sup>1</sup> When he was asked what then happens when there was no manager available he said the security would not sign for the keys and that there is a manager available for 24 hours at the store.<sup>2</sup> During re-examination the following day, he changed his version and said the floor manager would let the security to sign for the keys.<sup>3</sup>

(ii) *Scale*: when he was asked about the white square, which appeared in Exhibit B, he confirmed during cross-examination that, that was the scale and when one pulls the flap the scale opens. And that it is possible to place books on it when opened. The plaintiff testified that the scale was opened on the date of the incident and Mr Middelkamp placed the GR book on it. Mr Middelkamp, under cross-examination, mentioned that before the plaintiff fell, the scale was not used, it was closed and when he was asked later as to how the plaintiff would know that if one pulls the flap the scale can serve as a workplace as it was his first time to go to the butchery section. He could offer no

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<sup>1</sup> Volume 1 of the record page 109 line 25 .

<sup>2</sup> Volume 1 of the record page 110 line 10.

<sup>3</sup> Volume 1 of the record page 134 line 20.

plausible explanation. He was constrained to change his version and said that he showed the plaintiff how to open it. Counsel for the defendant picked up this inconsistency hence his abortive attempts to interject when Mr Middelkamp failed to explain the inconsistency in relation to this aspect of his version<sup>4</sup>.

[21] In light of what has been said immediately above, it becomes evident that Mr Middelkamp is not a reliable and credible witness. Mr Middelkamp's demeanor as a witness crumbled miserably under cross-examination thereby giving the impression that his testimony was possibly fabricated and not based on facts. By way of example, if one is required, he appeared to be anticipating a follow-up question before it was asked and then fell miserably off balance when asked the same question differently. In contrast the plaintiff was overall consistent and his testimony was both credible and reliable. And thus accords with the inherent probabilities.

[22] In light of the above, I am driven to the conclusion that the floor was not dry on the day of the incident giving rise to the plaintiff's claim as testified to by the plaintiff. And that the defendant should have foreseen that someone entering the butchery section could slip and possibly be injured. Accordingly it is clear that on the evidence that the incident was reasonably foreseeable and that the defendant should have taken reasonable steps to guard against the occurrence

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<sup>4</sup> Volume 1 of the record page 115 line15-20.

of the incident, which the defendant failed to do. As a reasonable person in the position of the defendant would have foreseen the possibility of his conduct causing harm to others he would have taken steps to guard against such injury. The plaintiff has, in my view, succeeded in establishing negligence on the part of the defendant.

[23] It bears mentioning that, it is common cause that the plaintiff was instructed to conduct work in a potentially dangerous environment. Therefore, given the prevailing circumstances at the time, the defendant owed the plaintiff a duty of care.

[24] Consequently, the defendant failed to discharge its duty of care to the plaintiff by ensuring that proper and effective measures were in place to guard against harm or injury to others. As already stated above, the defendant was therefore negligent in failing to take reasonable steps to keep the area monitored, cleaned and ensuring safety to any person entering it. In *Fritz v Sal-Vred-Dealers CC*<sup>5</sup>, the court found that the goods receiving section at the defendant's premises (a situation comparable to the facts of this case) was an area to which the defendant's duty of care was applicable.

Furthermore, no warning signs and disclaimer notices were affixed in a prominent place in the area concerned. ( See in this regard ,

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<sup>5</sup> Unreported judgment of the Western Cape High Court (Eastern Circuit Local Division, Goerge) delivered on 14<sup>th</sup> April 2010 under case number 3373/2010.

*Niemand v Old Mutual Investment Group (Pty) Ltd*,<sup>6</sup> where the court said at the time of the incident under consideration at that place there were no disclaimer notices displayed at the loading area and consequently found the defendant liable for the plaintiff's damages).

[25] The defendant in the alternative pleaded contributory negligence, in that the plaintiff did not keep a proper look out as he, by virtue of his employment at the defendant premises ought to have reasonably been aware of the possibility of water or similar spillage in the area. It is noteworthy to point out that, it was the plaintiff first time to carry out duties at the butchery section. In this instance the defendant bears the onus to prove negligence on the part of the plaintiff. With regard to the plaintiff's alleged failure to keep a proper look out, it is my view that the defendant failed to establish on a preponderance of probability, that whatever substance that may have been spilled on the floor was readily visible to the naked eye. Thus the defendant's contention in this regard is devoid of merit.

[26] Consequently, it is my conclusion that the Plaintiff has established all the elements of delictual liability and is accordingly entitled to damages.

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<sup>6</sup> Unreported judgment of the North Gauteng High Court, Pretoria delivered on 1 June 2012 under case number 35421/2009.

[27] In the results I make the following order:

(i) The defendant is held liable to pay to the plaintiff such damages as the plaintiff is able to prove that he suffered as a result of the injuries sustained on 7 December 2011 at Shoprite Despatch, Dr Rabie Street, Despatch.

(ii) The defendant is ordered to pay the plaintiff's costs occasioned by the hearing of the merits.

**FY RENQE**

**ACTING JUDGE OF THE HIGH COURT**

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