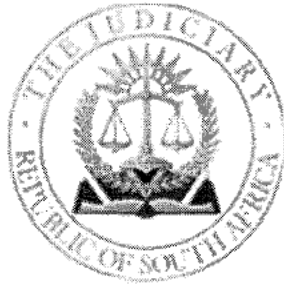


REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case Number: 2022/13159

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED: YES

16 September 2024

DATE


SIGNATURE

In the matter between:

NONHLANHLA NGWENYA

Plaintiff

and

ACCELERATE PROPERTY FUND

Defendant

This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 16 September 2024.

Key words: Delictual claim- Duty of care - Reasonable possibility of injury to another - Absence of precautions to prevent injury- Failure to take reasonable steps to guard against injury to another- claim not proved.

JUDGMENT

MUDAU, J

Introduction

[1] This action concerns a claim by Ms Nonhlanhla Ngwenya ("the Plaintiff") for damages against Accelerate Property Fund ("the Defendant") arising from an incident which occurred at the premises managed by the Defendant on 8 July 2021, when the Plaintiff fell and got injured at the relevant premises. The Plaintiff's claim is thus grounded in delict. It is trite that she bears the onus to prove the existence of the alleged risk and negligence on a balance of probabilities.¹

[2] In relevant parts, the plaintiff pleads as follows:

"5.2 The Plaintiff tripped and fell over a piece of metal skirting which was hanging loose from the wall (the accident"), and fell to the ground;"...

6. The defendant owed a duty of care to its customers, and in particular the

¹ Arthur v Bezuidenhout and Mieny 1962 (2) SA 566 (A) at 574H and 576G; Sardi v Standard and General Insurance Co Ltd 1977 (3) SA 776 (A) at 780C-H; Madyosi v SA Eagle Insurance Co Ltd 1990 (3) SA 442 (A) at 444D-G and Kruger v Coetzee 1966 (2) SA 428 (A) at 431.

Plaintiff, to guard against such an occurrence in paragraph 5 above.

7 The defendant should have taken reasonable steps to guard against such an occurrence in the following manner:

7.1 Ensuring that the metal skirtings and walkway on the premises were safe to the general public and properly affixed to the wall;

7.2 Ensuring that there were no obstructions in the building over which a member of the public and in particular the Defendant could have fallen over or tripped;

7.3 Placing warning signs at or around the obstruction.

8. The Defendant and/or their employees breached its duty of care in that:

8.1 They failed to ensure that the metal skirtings were properly fixed to the wall and that the walkway was free of any obstructions over which the general public, and the Plaintiff in particular could trip and fall;

8.2 They failed to conduct daily and regular checks to ensure that there were no obstructions over which the general public, and the Plaintiff in particular could trip and fall;

8.3 They failed to inform the general public, and in particular the general public, that there were obstructions over which the general public, and the plaintiff in particular could trip and fall;

8.4 They failed to take immediate steps to cordon off the area in the vicinity where the metal skirting was loose from the wall and was in the walkway in order to alert the public of the dangers posed by the loose metal skirting;..”

- [3] In its plea, the Defendant denies that any breach of duty of care took place. At para 6.2. the defendant pleads that in amplification of the denial *“that the metal skirting was properly affixed to the wall and that the walkway, for the plaintiff and general public, was free of obstructions, at all relevant times hereto, and in particular on the 8 of July 2021. There was accordingly no need for the defendant to place warning signs”*. In furtherance of the denial aforesaid the defendant pleads that *“the Plaintiff miss-stepped into the metal skirting and as a consequence caused her own fall”*. At para 6.4 the defendant pleads that it was not under a duty to make the premises absolutely safe, but only reasonably safe and could likewise accept that the plaintiff, upon allegedly entering the

defendant's premises, would take due and reasonable care of herself and her own safety. Especially taking cognisance that the plaintiff was allegedly pregnant at the time".

- [4] As an alternative plea, the defendant inter alia pleads that "the plaintiff, upon entering the defendant's premises, did, alternatively reasonably ought to have noted a sign with black and pink letters on a white background, prominently displayed, at 6 (six) entrance of the centre, with wording to the following effect:-

"RIGHT OF ADMISSIOV RESERVED. THIS PROPERTY IS OWNED AND MANAGED BY ACCELERATE PROPERTY FUND/MANAGEMENT.

Neither the owner, nor its agent, nor its employees shall be liable in any manner whatsoever, for any injury or harm, or loss to any person or in respect of any property in or on these premises, howsoever arising and due to any cause whatsoever including but not limited to any act or omission of the owner, its agent and employees, irrespective or whether such act or omission is negligent or willful and including but not limited to collision, theft, fire, rain or hail. All vehicles are parked in all respects at the risk of the parker, the driver and the owner thereof and all persons entering these premises do so at their own risk "

- [5] The issues are separated, and the trial proceeded on the issue of merits only. The issue of the quantum of damages to stand over for later determination later by agreement between the parties.

- [6] It is trite that in a case of liability for an omission, wrongfulness arises if the defendant had a legal duty to act positively. In *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as Amicus Curiae)*² it was said that:

"The appropriate text for determining wrongfulness [of an omission] has been settled in a long line of decisions of this Court. An omission is wrongful if the

² 2003 1 SA 389 (SCA) at 395

defendant is under a legal duty to act positively to prevent the harm suffered by the plaintiff. The test is one of reasonableness. A defendant is under a legal duty to act positively to prevent harm to the plaintiff if it is reasonable to expect of the defendant, to have taken positive measures to prevent the harm.”

- [7] The facts are uncontroverted and largely common cause. The plaintiff was the only witness to testify in support her case. The Defendant only called one witness, Mr Johannes Ngolomi who worked at Fidelity Security, which was during the relevant period, sub-contracted as security for the Defendant where he was deployed as a site manager.
- [8] On 8 July 2021, which is the day of the incident, the Plaintiff attended the Defendant's premises. The plaintiff testified that during the relevant times she- was employed by Electronic Toll Collection (referred to as "ETC") on behalf of SANRAL, a tenant, which was situated in one of the stores on the defendant's premises. She went to the bathroom, and upon her return at a corner of the passage through the readily used and accepted service entrance, she tripped “over something” and fell over a metal skirting that was on the wall on the open passage. In her words, “it felt like at the time, something pulled me back”. She testified that she was wearing "woollike boots".
- [9] She also stated that it felt as if someone, just like in school, was tripping her. At the time her foot got caught, she explained that she had already lifted her other foot and for that reason had no way of preventing her fall. That she was also pregnant at the time and tried to protect her unborn child by placing her right hand to minimize the impact on her stomach, causing the fractured wrist on her right-hand.
- [10] It is common cause that there were at the time, no forbidding signs indicating that such an entrance was restricted.
- [11] During cross-examination, she testified that she is not aware of the specific

disclaimer notices at the Centre. However, that she has general knowledge of disclaimer notices. She testified that, she is aware of the general contents and/or purpose of disclaimers.

[12] On behalf of the defendant, Mr Ngolomi testified that he had been employed at the relevant shopping centre since 2019. That he has background training in first aid and informal training on health and safety provided by his employer Fidelity Security. Part of his daily duties are to inspect the premises before it is opened for business and the public, and that he is the sole person that conducts such inspection. He is familiar with the area where the Plaintiff fell. He walked past the same area on the morning of the incident. Nothing was out of place or unusual that morning. He also testified that the disclaimer notices have been on the walls since he has started working there and that they have never been replaced.

[13] In cross examination however, he conceded that he does not have any type of qualified certification and/or appointment as a designated Health and Safety official; or in relation to the National Building Regulations and Standards Act, Act 103 of 1977 or any of its regulations. Ngolomi did not witness the incident and was only informed of such incident by radio. He completed an incident report, which he sent to his employer. No further report was ever issued by his employer nor were he involved in any further internal investigation. He confirmed that no Labour Department report or investigation following this incident was brought to his attention. During the inspection in loco that was conducted, he confirmed that the "no entry" sign that was placed on the service door, was placed there, only after the incident occurred.

Video footage

[14] The video footage in relevant parts starts at 08:52am, when the Plaintiff entered the service entrance on her way to the bathrooms. The Plaintiff returned from the bathrooms at 08:58am, where she barely passed the corner when she tripped, causing her to fall forward. The plaintiff can be seen cutting the corner and moving closure to the edge of the skirting as if distracted. The original video footage was viewed during the inspection in loco in the defendant's control

rooms in the presence of all the parties.

- [15] The Plaintiff submits that the only logical inference for the Court to make after viewing the footage is that the skirting must have been ajar/loose/protruding for the Plaintiff to be caught causing her to fall in the way she did.

The disclaimers

- [16] It is not in issue that, five disclaimer notices were in place on various pillars on main entrances or walkways inside the centre, including a disclaimer in the vicinity of the plaintiff's place of employment.

- [17] It is trite that the test for establishing negligence is the established one of the *diligens paterfamilias* in the position of the defendant. The *locus classicus* remains *Kruger v Coetzee*³, the court describing the test as follows:

"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; and

(b) the defendant failed to take such steps."

- [18] It is clear from all the evidence is that after the incident a portion of the aluminium strip skirting had been dislodged, bent and stood at an angle. There is no direct evidence from the plaintiff to suggest that it was the in that position before her fall. It was never suggested to Mr Ngolomi that he was incorrect about the fact that he did not see anything untoward as alleged or that, there was in fact something untoward in that the skirting was damaged. The video shows that prior to the incident, to the naked eye, the skirting was not visibly damaged, loose or hanging in any way, contrary to what is alleged by the Plaintiff. There is no doubt from the video footage that, it was not the condition

³ 1966 (2) SA 428 (A) at 430E–F [also reported at [1966] 2 All SA 490 (A) ; see also *Jacobs and another v Transnet Ltd t/a Metrorail and another* [2014] ZASCA 113, 2015 (1) SA 139 (SCA)], confirming the *dictum* and explaining that the test rests on two bases, namely, reasonable foreseeability and the reasonable preventability of damage; in *Ngubane v South African Transport Services* 1991 (1) SA 756 (A) at 776G–777 [also reported at [1991] 4 All SA 22 (AD)].

of the skirting (the bent aluminium strip skirting) immediately prior to the incident. As stated, the Plaintiff carries the burden to prove this. Mr Ngolomi's version in this regard stands to be accepted as undisputed.

[19] As the defendants contends, the plaintiff did not tender any evidence to illustrate the apparent risk, either personally or with the assistance of any other witness or building expert. There is no evidence of how the currently bent skirting was affixed to the remainder of the skirting; whether it is merely clipped in, glued down or maybe even bolted down. Overall and in summary, there is no evidence that shows that the skirting was in any way damaged, hanging loose or protruding as alleged in the particulars of claim and consequently caused a dangerous situation. There is no denying that, these were matters for the Plaintiff to canvas, either through witnesses or in cross examination of the Defendant, seeing that the onus of proof was on the Plaintiff⁴.

[20] The Plaintiff submits that the only logical inference for the Court to make after viewing the footage is that the skirting must have been ajar/loose/protruding for the Plaintiff to be caught causing her to fall in the way she did. But in the absence of any admissible evidence, this calls for conjecture or speculation. As the defendant submitted in closing argument with which I respectfully agree. Thus, based on the evidence as a whole it cannot be said that the Plaintiff proved that the Defendant was aware or could reasonably have been aware of any alleged shortcomings with the now bent skirting.

[21] But there is more. The pleadings cannot be ignored. The disclaimer notices were prominently displayed and are 60cm by 42cm (A3 paper size) displayed at eyes height in clear and unambiguous terms and as indicated one on a pillar, next to the scene of incident. The signs as the defendant point out, are not hidden or displayed amongst other more glamorous signs but are displayed on their own. The signs were printed in black and red on a white background. At A3 in size, they are reasonable sized and pertinently displayed in a way that

⁴ *Kruger v Coetzee* above at 432.

would draw the attention of a reasonable passerby. On her version, the plaintiff understood the consequences of the disclaimer signs.

[22] The Plaintiff does not deny having noticed the signs nor that she had read them. The allegation that the plaintiff says she did not pay attention to them for the two years she worked at the centre does not assist her. As Mlambo JA in *Jacobs v Imperial Group (Pty) Ltd*⁵ observed in similar facts on appeal at para 10 that, "The respondent was, in my view, entitled to assume, having displayed the notice in this manner, that any of its customers would notice it" as the defendant also pleaded in the alternative.

[23] In *Durban's Water Wonderland (Pty) Ltd v Botha and another*⁶ the Supreme Court of Appeal made it clear with reference to *Government of the Republic of South Africa v Fibre Spinners & Weavers (Pty) Ltd*⁷ that exemption clauses or disclaimers are part of our law:

"The correct approach is well established. If the language of a disclaimer or exemption clause is such that it exempts the *proferens* from liability in express and unambiguous terms, effect must be given to that meaning. If there is ambiguity, the language must be construed against the *proferens*. But the alternative meaning upon which reliance is placed to demonstrate the ambiguity must be one to which the language is fairly susceptible; it must not be "fanciful" or "remote."

[24] I am accordingly satisfied that the plaintiff had sufficient time to read the various disclaimers, particularly the one in the proximity of her store during the two years of her employment there before the incident. Any ordinary alert buyer or employee in the position of the defendant inside the mall would have seen and be able to read it. I am satisfied that actual, or at the best for her, quasi-mutual assent was proven in respect of the said disclaimer. Accordingly, on the factual

⁵ [2010] 2 All SA 540 (SCA).

⁶ 1999 (1) SA 982 (SCA).

⁷ 1978 (2) SA 794 (A) at 804C.

basis presented at the time, the plaintiff assented to the terms and conditions of her presence at the centre.

- [25] Counsel for the plaintiff referred this court to inter alia, the SCA decision in *Cenprop Real Estate (Pty) Ltd and Another v Holtzhauzen*⁸. There a member of public while at shopping mall slipped on floor owing to presence of rainwater having been brought inside by shoppers. The court per Molefe AJA (as she then was) held in finding for the claimant inter alia, that

“In my view, a reasonable person would ensure that, given the potential danger posed by the wet tiles in rainy conditions, adequate measures are put in place. Secondly, if ensuring the premises are safe in those conditions is the duty of the contractor, that must be clearly set out in the scope of duties... the respondent knew the mall very well and had often visited it in the past, even on rainy days. On the day of the incident, she was fully aware that the floor was wet and could therefore be slippery. She even saw the 'wet floor' warning signs at the entrance of the mall and walked 20 paces on the same wet surface before she fell.”

- [26] *Cenprop Real Estate* matter re-iterated the principle that the duty to take reasonable steps to safeguard shoppers to a mall and the floors in it from the risk of danger or harm falls on the owner of the mall for the negligence of subcontractor. However, the *Cenprop Real Estate* matter is clearly distinguishable from this matter in that in *Cenprop*, the danger being the water on the tiles was apparent, special and foreseeable. Also, the experts agreed that the tile used could be considered slippery under foot when wet. The water on the tiles clearly required something extra being done. Significantly, the Plaintiff positively testified that she had not seen the disclaimers notices. Equally significant, unlike in this instance, the disclaimers were in that matter obstructed by merchandise.

- [27] Counsel also referred to *Niemand v Old Mutual Investment Group Property*

⁸ 2023 (3) SA 54 (SCA) at p61.

*Investment (Pty) Ltd*⁹. The distinguishing factor from this matter being that in Niemand unlike here, as at the day of the incident, there was no disclaimer notices at the loading zone the Plaintiff used but put up after the fact. Similarly, *Pete V Boxer Superstore (Pty) Ltd*¹⁰ is clearly distinguishable from this matter in that Pete as counsel for the defendant points out, was true "spillage slip and trip" matter as a result of the flour on the tiled floor.

[28] Accordingly, in my judgment, there was no foreseeable risk present at the Defendant's premises, despite the occurrence of the incident established by the plaintiff. It follows that, it cannot be concluded that there was a foreseeable risk of which the Defendant ought to have been aware and that the Defendant failed to take such steps as the diligence paterfamilias ought to have taken. The Plaintiff did not prove foreseeability or negligence on the side of the Defendant and accordingly failed to prove her case as she carried the burden to do.

[29] Order
Plaintiff's claim be dismissed with cost on scale A.



TP MUDAU
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Date of Hearing: 7 May 2024

Date of Judgment: 16 September 2024

⁹ 2012 JDR 0898 (GNP).

¹⁰ 2022 JDR 1337 (ECP).

APPEARANCES

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Burnett Attorneys & Notaries

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Instructed by:

Whalley & Van de Lith