



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No. 4420/2017

In the matter between:

ALBERTINO LORENZO BENNET

Plaintiff

And

PRIMA TOYS AND LEISURE TRADING (PTY) LTD

First Defendant

FOCUS ASBESTOS REMOVAL SERVICES CC

Second Defendant

Coram: Pangarker J

Hearing dates: 10, 12 - 13 February, 17 March and 29 April 2025

Judgment delivered: 7 November 2025

Summary: *Delict* – Claim for damages against owner of warehouses and asbestos contractor – Contractor employed to clean warehouse roofs – Plaintiff, employed by contractor, fell through roof when he stepped on a skylight and injured himself – Duty of care and liability of defendants distinguished – Contributory negligence of plaintiff in not wearing fall arrest equipment while on the roof, considered

ORDER

- a. The defendants are liable to the plaintiff, jointly and severally, the one paying the other to be absolved, for 60% of his proven or agreed damages.
- b. The defendants are liable to pay the plaintiff's party and party costs, jointly and severally, the one paying the other to be absolved (counsel's fees on scale C).
- c. The trial on quantum is postponed *sine die*, pending the completion of the pretrial and/or case management process on *quantum*.

JUDGMENT

PANGARKER J

Introduction

[1] On 13 March 2014, the plaintiff, who was working on an asbestos roof on the first defendant's warehouse in Epping 1, fell through a skylight onto the concrete floor of the warehouse. He pleads that as a consequence of the fall he sustained various injuries to his right elbow, right wrist, pelvis and lacerations to the face and that as a result of these injuries, he suffered damages comprising past and future medical expenses and general damages, totalling R1 640 000. In view of the issues in the trial, it is necessary to set out the pleadings in some detail. For convenience sake, Prima Toys is referred to as

“PT” and Focus Asbestos as “FA” and the plaintiff’s fall through the skylight is referred to as “the incident”.

The pleadings

[2] On 9 March 2017, the plaintiff caused a Summons to be issued against both defendants, who are sued jointly and severally liable. The salient averments in his Amended Particulars of Claim are summarised in the following paragraphs. At all material times, the plaintiff was employed by Johan Fourie who was sub-contracted by the second defendant, Focus Asbestos Removal Services (CC) (FA) as a mandatary as defined in the Occupational Health and Safety Act, 85 of 1993 (OHS Act)

[3] On 13 March 2017, Mr Fourie instructed him to climb onto the roof of the plaintiff’s warehouse to paint a section of the asbestos roof. The plaintiff, in carrying out the instruction, stepped unknowingly onto a skylight obscured by dirt and hence fell through it, onto the concrete ground below.

[4] The first defendant, Prima Toys and Leisure Trading (Pty) Ltd (PT) and/or the second defendant allowed the plaintiff to work in an elevated position on the roof when they knew that such work could not be performed safely unless the plaintiff had a safety harness and/or fall arrest lanyard as required by Regulation 8 of the Construction Regulations¹, read with Regulations 4, 5 and 7 thereof and Regulations 6 of the General Safety Regulations of the Act. The plaintiff pleads that PT and/or FA and their employees and/or Mr Fourie (who were acting in the course and scope of their employment with the defendants), were negligent in one or more ways in that they:

8.1 Failed to prepare health and safety specifications for the work to be performed on the warehouse roof of First Defendant as required by Regulations 4 and 5 of the Constructions Regulations promulgated under the Act;

¹ In terms of the Act

- 8.2 *Failed to discuss and negotiate the content of the health and safety plan contemplated in Regulations 5(1) of the Act and thereafter to finally approve the health and safety plan for implementation as required by Regulation 4(2) of the Construction Regulations;*
- 8.3 *Failed to take reasonable steps to present a suitable health and safety plan as required by Regulation 5(1) of the Construction Regulations and that such plan would be implemented in terms of Regulation 4(1) (d) of the Construction Regulations before the work commenced;*
- 8.4 *Failed to stop Plaintiff from executing the work when they knew or ought to have known that the work was not being carried out in accordance with a suitable health and safety plan and the failure to do so posed a threat to the health and safety of the Plaintiff as they were required to do in terms of Regulation 4(1)(e) read with Regulation 5(1) of the Construction Regulations.²*

[5] It is thus further pleaded that by virtue of the above, PT and/or FA were guilty of wrongful conduct. They breached their duty towards the plaintiff by failing to ensure that he was not exposed to hazard, when they knew or ought to have known that it was dangerous to allow him to work on the roof without the use of fall arrest equipment to prevent him from falling.

[6] Furthermore, PT and/or FA failed to take any adequate steps to prevent the plaintiff from falling through the roof when they could and should have done so. As a result of the injuries which he sustained, the plaintiff was hospitalized, received medical treatment, endured pain and suffering and suffered a loss of earning capacity.

[7] In its further Amended Plea, PT admits that the plaintiff was working at its Epping 1 warehouse on 13 March 2014 and that he fell from a height onto the concrete floor. PT pleads that it has no knowledge of the circumstances surrounding the plaintiff's fall, nor of the allegations and puts the plaintiff to the proof of his allegations. In response to

² Par 8, Amended POC

the averments in the Amended Particulars of Claim regarding the provision of adequate fall protection equipment³, PT pleads as follows:

7.1A In amplification of the aforesaid denial, but without derogating from the generality thereof, the first defendant pleads as follows:

7.1A.1 Only in the event that it is sought to be affirmatively alleged that the first defendant and/or second defendant and/or Johan Fourie, being obliged to do so, failed to provide the plaintiff with adequate fall protection equipment, such allegation is denied.

7.1A.2 On the day in question the plaintiff received from or on behalf of Johan Fourie adequate fall protection equipment which he either failed to wear or otherwise removed prior to his fall.

7.1A.3 The plaintiff's aforesaid conduct

(a) Was the proximate cause of his fall, which broke the causal nexus between any wrongful and negligent conduct ascribed to the first defendant in the plaintiff's particulars of claim (none of which is admitted) and the plaintiff's fall

(b) Constituted a novus actus interveniens, which broke the causal nexus between any wrongful and negligent conduct ascribed to the first defendant in the plaintiff's particulars of claim (none of which is admitted) and the plaintiff's fall, and/or

(c) Constituted a voluntary assumption by the plaintiff, who at all material times knew of and fully appreciated the danger, absent the use of adequate fall protection equipment, of falling from an elevated position on the roof of the warehouse and injuring himself on the floor below, of the risk of so falling.

³ Para 7, Amended POC

7.2 *In further amplification of the aforesaid denial, but without derogating from the generality thereof, the first defendant pleads that it had entered into a contract with the second defendant in terms whereof the second defendant executed certain specialised works at the premises of the first defendant, which works were executed under the exclusive control of the second defendant in its capacity as an independent contractor.*

7.3 *First and second defendants had entered into a written agreement on occupational health and safety in accordance with the provisions of Section 37(2) of the Occupational Health and Safety Act 85 of 1993 in terms whereof the parties agreed to arrangements and procedures between them to ensure compliance by the Second defendant in its capacity as mandatory with the provisions of the aforementioned act. A copy of the agreement is annexed hereto, marked annexures PT1 and the first defendant prays that it shall please this Honorable court to incorporate the agreement herein and read the same herewith.*

[8] Furthermore, the further Amended Plea denies that PT was wrongful but if the Court should find that its conduct was wrongful, then in that event, such wrongful and negligent conduct did not cause or contribute to the fall. In the alternative, and only in the event that it is found that PT was wrongful and negligent and that such conduct contributed to the plaintiff's fall, PT pleads that FA was contributorily negligent as pleaded in paragraphs 8.1 to 8.4 of the Amended Particulars of Claim and the plaintiff was contributorily negligent in the following respect:

8.3.1 *He had, without the knowledge of the second defendant or any of its representatives, including the mandatory, removed his personal protective equipment and safety harness.*

8.3.2 *He had failed to keep a proper lookout and in so doing executed a dangerous maneuver when he stepped onto a skylight.*

8.3.3 He failed to have due regard for his own safety.

8.3.4 He failed to have regard to issues pertaining to safety and warnings imparted to him during toolbox talks.

8.3.5 He failed to avoid the incident when by the exercise of reasonable care he could and should have done so.

[

[9] In respect of the plaintiff's further averments as pleaded, PT denies the allegations and puts the plaintiff to the proof thereof

The second defendant

[10] FA was legally represented and delivered a Plea in early 2018. Subsequently in May 2020, its legal representatives withdrew as attorneys of record. During pre-trial proceedings, and while FA still participated in the action, the parties had agreed that the trial should proceed on the merits first.

[11] In the 29 May 2020 pre-trial, it was noted that the correspondent attorney on behalf of FA withdrew and that despite attempts by the plaintiff's legal representative to enquire about FA's position, such attempts proved unsuccessful. Several pre-trials followed, and on 7 December 2020 Kusevitsky J granted an order whereby FA was ordered to furnish a reply to the plaintiff's Rule 35(3) notice within 10 days of service of the order, failing which the plaintiff was entitled to apply on the same papers, duly supplemented, that FA's defence be dismissed and judgment be entered in the plaintiff's favour. It is evident from the Court file and its contents that a subsequent application for a dismissal of the defence in terms of the order never occurred.

[12] In a later pre-trial conference on 3 March 2022, it was recorded that FA had ceased operating approximately three years prior, that it had no assets and was in the process of de-registering, hence no further application to dismiss its defence would

follow. FA also filed a statement which does not take the form of a Plea. The statement addressed by Gerald Pietersen, the member of FA, and dated 29 October 2020, indicates, *inter alia*, that the close corporation ceased trading two/three years prior and toolbox records from the day of the incident (the plaintiff's fall) were held on site in a safety file at PT's warehouse, which was standard practice.

The trial

[13] The trial proceeded on the merits. The plaintiff and Dr Willem Johannes du Toit, an engineer, testified. On behalf of PT, only Michael Webster testified, and as anticipated, FA did not participate in the trial.

The plaintiff

[14] The plaintiff testified that he was working for FA for three months prior to the incident, employed to paint roofs and remove asbestos, and was working at the PT site for about two weeks prior to the incident occurring. He previously worked at the Paarden Eiland and I & J sites where he assisted with asbestos removal for FA. At the I&J project, he worked at a height of approximately three storeys.

[15] The plaintiff was living in Malmesbury and he secured the job with FA through friends living in the same area. Transport was arranged from Malmesbury to PT's premises and back every working day, and he explained that they were about eight to nine employees who worked on the project.

[16] On the I&J project, the workers were required to wear a safety harness when working on the roof. The harness consisted of straps which could be secured to a safety line which was anchored or secured to the building, thus if the worker fell from the roof, his fall would be arrested, leaving him hanging in mid-air. A similar safety protocol was followed at the Paarden Eiland site.

[17] At the PT site, which forms the subject of the trial, the workers (including the plaintiff) were not required to clean asbestos from the roofs. His job was to clean fungus from the asbestos roofs and then paint the roofs. On the first day, the plaintiff and his

colleagues arrived via bakkie at around 07h00 and they received a safety briefing which is referred to as a “toolbox talk” provided by one Johan Fourie. The purpose of the toolbox talk was to inform the workers about their boots, harnesses and safety equipment which they were required to wear.

[18] Mr Fourie was concerned about the health and safety of the workers and gave the only toolbox chat and demonstrated to them how to wear the harnesses and clip them onto the safety lines. In cross-examination, the plaintiff clarified that during the toolbox demonstration, there was no safety line as the talk occurred in a room. The plaintiff nonetheless knew how to use the hook on the safety line when wearing a harness as he did so during the I&J project.

[19] The plaintiff expected that there would be a safety line on the building with which he and his colleagues could use the harnesses but there were none. He agreed with the statement from PT’s counsel that it would be absurd to provide the workers with the safety gear and harnesses yet not provide a safety line onto which these harnesses could be attached.

[20] Providing more detail regarding the safety gear/equipment, the plaintiff explained that it comprised of white masks, asbestos safety hazmat suits and harnesses, and the equipment was stored on site. The workers would be provided with a new suit (and presumably masks) every day and were informed by Mr Fourie that they were always required to wear the harnesses. The plaintiff testified that when he climbed onto the roof he did not clip his harness onto any safety line because there was no line available. He explained, when questioned by his counsel as to the reason why they (the workers) wore the harnesses when there was no safety line to which it could be hooked, that they wore the harness *“so that we could just have it on”*.⁴

[21] The plaintiff was not taken onto the roof to show/demonstrate to him what needed to be done. The job entailed scrubbing the roofs with a wire brush and then painting it. The plaintiff made it clear that he knew what needed to be done/what the job entailed because they had done this kind of work before on other projects.

⁴ Transcript, 10 February 2025

[22] When they walked out on site in the morning, the workers wore the safety harnesses, and to the best of his recollection, nobody from PT was present to check on the work which they were doing. On 13 March 2014, the plaintiff was not wearing a harness because the harnesses were collected by FA from the site for a job at the harbour, two days prior. The plaintiff saw the removal of the harnesses.

[23] On the day of the incident, the workers went up onto the roof and the incident/fall occurred before 10h00. Two of the workers went down the stairs and the plaintiff returned with a half-full bucket of paint up the side-stairs of the building in order to access the roof. He walked across the roof along the heads and had not walked across that area of the roof in the two weeks prior to the incident. As he walked on the roof in the building marked “X” on Exhibit B, and put his foot down, his foot “*vanished*” and he fell through a skylight to the concrete ground below and suffered various injuries: a cracked pelvis; his elbow and wrist were injured and he had knocked his head lightly on the ground. The plaintiff spent a month in hospital and was not contacted by PT, Mr Fourie or Mr Pietersen after his fall. He was aware that someone else fell through the roof of the building some time prior to his incident.

[24] The plaintiff denied that it was his fault that he fell through the skylight and also denied PT’s averment that he had not paid attention to the toolbox chat. Those skylights that had already been cleaned were not painted over, and the plaintiff remained steadfast on this point.

[25] The plaintiff also denied that he received his fall protection equipment, including a harness, from Mr Fourie on the day of the incident. He had no idea where PT came upon the story that he had removed his harness prior to the fall. He reiterated that there was no safety line attached to the building during the two weeks when he worked on the roofs.

[26] The workers spoke amongst each other regarding the fact that they were unhappy/uncomfortable about wearing a harness when there was no safety line to attach it to. In cross-examination, the plaintiff agreed with counsel for PT that the harnesses were useless in the circumstance where there was no safety line to attach

them to. They were unhappy about this but did not complain to Mr Fourie because they were simply workers and if there was no work, they would have to go home. The foreman was one Recardo, a friend of the plaintiff. The workers spoke about the lack of a safety line but did not ask Recardo to take up the issue with FA, at the same time, the plaintiff testified that he was unaware if Recardo had taken up the issue with FA.

[27] Furthermore, the plaintiff denied that it was his fault that he fell through the skylight because he had stepped on it. In cross-examination, he disagreed with PT's version that point "Y" on Exhibit B marked the place where he had fallen through the skylight. The plaintiff also clarified that point "Z", which was diagonally opposite "X", was the point where the workers commenced cleaning and painting the roof after the toolbox talk. This area did not have skylights and there were no safety lines in area "Z".

[28] The plaintiff agreed with the first defendant's counsel that the harnesses were useless. The absence of the safety line was not reported to anyone because they were just workers. He denied that he could walk on the roof as allowed by the safety ropes, which is the version put to him by PT's counsel.

[29] The plaintiff also testified that four workers worked on one roof and the other four co-workers, were on another roof. The plaintiff did not have knowledge as to whether there were safety lines/cables in areas on a roof where he did not work.

[30] The plaintiff did not see Mr Webster, PT's only witness, on the scene after his fall, and stated that he also did not see the latter before the incident occurred. The plaintiff confirmed his version in chief that on the day of the fall, he was not wearing the harness because there were none provided, and the eight workers (including him) went onto the roof.

[31] In re-examination, the plaintiff maintained that the cleaning process started on point "Z"⁵. The plaintiff was on the roof for three to five days before he fell and no scaffolding was provided to ascend and descend the roof.

⁵ Exhibit B

Dr Willem du Toit, plaintiff's expert

[32] Dr du Toit, an engineer, provided a report dated 15 September 2020 wherein he offered his expert opinion on the cause of the incident against the backdrop of the Health and Safety legislation and the responsibilities and duties of the parties and Mr Fourie. Dr du Toit's credentials and experience as set out in his *curriculum vitae* were not in issue.

[33] Two import aspects regarding Dr du Toit's evidence are highlighted at the outset of the summary of his testimony: firstly, he reported and was of the view that Mr Fourie, as sub-contractor to FA, was the plaintiff's employer. The evidence of the plaintiff clearly does not support this view and it was accepted at the trial that FA was his employer. Secondly, the 2014 Construction Regulations did not apply to the defendants; rather, it was accepted that the 2003 Construction Regulations applied. Unless the contrary is indicated, the reference to "the Regulations" is a reference to the 2003 Construction Regulations.

[34] In the matter at hand, PT was the client and FA was the principal contractor. The relationship between the contractor and principal contractor was governed by Regulation 5 which indicates each party's duties. Regulation 4 concerns the client's duties and obligations. Dr du Toit explained that PT was required to prepare a baseline risk assessment for the intended construction work project to the roofs of the warehouses but failed to do so. In his report he found that the methods used to mitigate risks (such as the plaintiff working on a roof without a safety harness connected to a safety line) were not employed on site.

[35] In respect of the mandatory contract concluded between the defendants, PT1, Dr du Toit testified that it was outdated and did not comply with applicable Regulations at the time.

[36] Insofar as FA's first quotation⁶ to PT, the asbestos works would be in terms of asbestos Regulations but there was no reference to working at heights. According to

⁶ First quote, 2 June 2012

the witness, a fall prevention plan and fall arrest equipment were needed. As to the scope of work to be performed by FA, guidance was provided by Mr Webster of PT and information was supplied by the AIA, Asbestos Inspection Authority⁷.

[37] Dr du Toit was questioned further about FA's scope of work⁸ and was of the view that FA's second quote contained an asbestos plan. Furthermore, he was of the view that there was an obligation on PT as the client to identify anything that posed a risk on site and he reiterated that there was no fall arrest plan when working at heights.

[38] In cross-examination, Dr du Toit agreed with the statement that it was expected that there would have been a safety harness hooked to a safety rope. He had visited the site. With reference to the mandatory agreement in terms of section 37(2) of the OHS, he agreed that the client was concerned about safety,⁹ but his view was that PT did not quite get it right.

[39] Dr du Toit also agreed that when the incident occurred on 13 March 2014, the project had been up and running for 10 weeks already. He stated that the Regulations applicable were the 2003 Construction Regulations and that at the time of commencement of the project, there was no obligation on PT to prepare a baseline risk assessment, because Regulation 5(1) (a) did not exist in the 2003 Regulations¹⁰.

[40] Additionally, Dr du Toit did not verify the place where the plaintiff fell through the roof and no specific place was pointed out to him. He confirmed that it was not reported to him that according to the plaintiff, there were no safety ropes attached to the roof. Had he known this, he would have included it in his report.

[41] Furthermore, had he been informed that the PPE equipment (including harnesses) were removed from site two days before the incident, as testified by the plaintiff, he would have referred thereto in his report. His testimony was that in those circumstances, "*they*" should have ceased work immediately.

⁷ Dr du Toit testified that he did not see such information in AIA report

⁸ See p52

⁹ Dr du Toit could not comment that PT1 was prepared by FA.

¹⁰ The 2014 Regulations were published in GG 37305 of 7 February 2014, at a time when the project of PT had already commenced.

[42] Dr du Toit confirmed/agreed that PT was not in the business of roof construction. According to his professional opinion, if there was a broken roof sheet and PT was not competent enough in construction then they should have appointed an expert in construction to attend to the damaged roof sheets. He also denied that Ms Cecilia Keet of the Occupational Hygiene Monitoring Services CC was the kind of expert he referred to as she attended to an asbestos risk assessment¹¹. He testified further that if the risk of falling from height was apparent to the contractor, then it would also have been apparent to PT.

[43] From the AIA Report, Dr du Toit could not infer that a health and safety report was received. He had no issue with the asbestos removal procedures and when questioned about the AIA report, clarified that it related to asbestos removal, not construction and was not a health and safety plan. In respect of the content of a health and safety plan, the witness referred in some detail to Regulation 7.

[44] Furthermore, as PT had failed to discuss and negotiate a health and safety plan with FA as required by Regulation 4(2), it had not absolved PT from complying with Regulation 5(1) in that as client, it was required to have its own health and safety plan. Dr du Toit explained that the contractor, FA, would have had to be given PT's health and safety specifications in accordance with Regulation 5(1) in order to provide its health and safety plan as the contractor¹². He agreed that it was FA's obligation to supervise construction work and appoint an employee as construction supervisor as required by Regulation 6(1).

[45] On the facts, Ricardo was the foreman of FA, who should have seen that there were no safety ropes/lines attached to the roof, and which led to the plaintiff's fall. The witness also blamed the plaintiff for failing to refuse to work without a harness and added that the appointment of a construction safety officer in terms of Regulation 6(6) was the responsibility of FA and not PT, the client. He stated that if there were hidden risks, and such officer did nothing to monitor the site and keep documentation, then the responsibility would be that of FA.

¹¹ Ms Keet's report could only be referred to insofar as it referenced a factual scenario and not insofar as what it purported to be.

¹² Regulation 5(1), 2003 Regulations

[46] Dr du Toit confirmed that FA was also required to comply with Regulation 7(4) which called for the appointment of competent person to inform, instruct and train workers regarding any hazard and procedures before work commenced. It was FA's responsibility to have a risk assessment done by a competent person and the failure of FA to do so, was not to be blamed on PT. Where the workers (such as plaintiff) were not adequately trained by a competent person,¹³ PT cannot be blamed as the responsibility lay with FA.

[47] The contractor was required in terms of Regulation 8 to have a fall protection plan implemented and the provision of PPE was the responsibility of FA. Despite efforts to distance PT from Regulation 8, which was clearly the obligation of FA, PT was required to discuss a health and safety plan, which included fall protection.

[48] It was put to the witness that PT provided the AIA report to FA and regarded it as a health and safety plan, but Dr du Toit remained steadfast that such report was in terms of asbestos removal. The failure to comply with Regulation 8(4) would be that of the contractor.

[49] When pressed further Dr du Toit was adamant that he saw no fall protection plan in terms of Regulation 8(3) and if a proper fall protection plan had been implemented, the fall would not have occurred. Dr du Toit could not comment on whether there was a health and safety file as he never saw one. As far as the skylights were concerned, he testified that written indication should have been given of the risk associated with skylights¹⁴.

[50] In re-examination, Dr du Toit stated that Mr Webster, if he walked around the site and observed that the workers were not wearing hazmat suits and masks, was obliged to report it to the contractor.¹⁵ Furthermore, the client was required to stop the contractor from executing construction work if it was observed that the latter was not complying with its own health and safety plan referred to in Regulation 5(1). He also agreed that fungal growth occurs on skylights, and depending on where in the warehouse it

¹³ Regulation 7(4), 2003

¹⁴ Presumably by the client, PT

¹⁵ Regulation 4(1)(e), 2003

occurred, one may misjudge oneself in that the roof sheets and skylights may look similar.

Michael Webster

[51] Prima Toys at one stage had several factories dealing with the manufacturing of toys but due to the advent of Chinese imported toys, the factories were forced to close. At the time of the incident, the business was confined to warehousing and distribution of toys. Mr Webster had been employed by PT for 25 years and was retired and residing in Zimbabwe. At the time of the incident, he was the loss control manager and attended to building maintenance.

[52] On behalf of PT, Mr Webster commissioned Occupational Hygiene Monitoring Services CC¹⁶ to prepare an asbestos risk assessment in respect of the asbestos roofs on the PT site. He made enquiries regarding repairs and cleaning to the asbestos roofs and was provided with the names of three companies. Ms Keet's AIA report was provided to the competing companies.

[53] Focus Asbestos was represented by Gerald Pietersen who visited the PT site for purposes of a walking inspection. Mr Webster and Mr Pietersen conducted an inspection of the premises for one and a half hours, whereafter the latter was left on his own to freely inspect the buildings. Mr Webster testified that he presumed Mr Pietersen took measurements and looked at the roofs of the warehouses.

[54] According to the witness, both men entered the warehouse building where the plaintiff stated he had fallen through a skylight. According to Mr Webster, the incident occurred at point "Y"¹⁷. Both men looked up at the roof from their vantage positions inside the warehouse and the roof seemed normal and the skylights were clear.

¹⁶ Exhibit A, p55-75

¹⁷ It is noted that there remained a dispute as to the place where the plaintiff fell through the skylight: according to the plaintiff, it occurred at point "X" and according to Mr Webster, the fall occurred at point "Y"

[55] Mr Webster testified that the skylights in the building in question were not manufactured of fibreglass, rather of polycarbonate¹⁸, and the result was that they were a lot cleaner and clearer than in the old buildings. According to Mr Webster, the older warehouse buildings contained fibreglass skylights. After the inspection on 2 June 2012, FA provided a quotation to PT¹⁹. The scope of the work to be performed by FA as per the June 2012 quotation, included the replacement of dirty fibreglass with polycarbonate sheets instead.

[56] Mr Webster had attended other sites where FA performed asbestos roofing work in order to inspect their standard of work, and satisfied himself with the standard of workmanship. Accordingly, he recommended FA to his supervisor, after a discussion about the quotes. Mr Webster was satisfied that FA was a fully certified asbestos removal business and were one of the businesses recommended by Ms Keet who was registered as an asbestos expert with the Department of Labour.

[57] In respect of the mandatory agreement, PT1, Mr Webster testified that FA drafted the contract which was on PT's letterhead. Changes were made thereto and it was signed on 9 April 2013, but work had already commenced on the site prior to signature. Mr Webster was referred to various clauses in the mandatory agreement, all of which he confirmed.²⁰ The purpose of the agreement in respect of FA's employees was to ensure that the contractor complied with the OHS Act.

[58] Mr Webster had no knowledge of the 2003 and 2014 Construction Regulations when concluding the contract and had only become aware of them during the trial. He confirmed the June 2012 quote provided by FA and explained that a decontamination chamber for the workers' removal of PPE equipment was built by FA and provision made, *inter alia*, for a lock-up garage for storing PPE.²¹

[59] Mr Webster signed the mandatory contract on behalf of PT. The terms were retyped by PT, and despite some confusion, it was accepted that FA was the mandatory and PT was the client/principal. On the date the mandatory agreement was signed, FA

¹⁸ Point "y" on Exhibit B.

¹⁹, Quotation, p50, Exhibit A

²⁰ Clauses 3,5,6,8,11 and 20

²¹ Point A on Exhibit B

rendered an invoice to PT for a first payment by PT and payment was subsequently made.

[60] After FA commenced work on the site, Mr Webster would walk around the PT site/premises at least once a day. From ground level, he saw FA staff on the roof watering, scrubbing and performing various tasks. As the project progressed, every three to four weeks, he would climb up a ladder to roof height and inspect whether the workers were performing the work they were required to do.

[61] He recalled what he observed: the FA workers were dressed in hazmat suits and masks, wearing the harnesses which had clasps hooked onto safety lines which stretched across the building. He explained that when the workers arrived in the morning, they donned the hazmat suits, masks and harnesses before being admitted to the area where they were required to work. Mr Webster did not know how the safety lines were attached to the roofs. He understood that the purpose of the safety harness was to allow the workers to move along the roofs. However, he admitted that there were not safety lines across the roofs of the entire complex as shown on Exhibit B.

[62] Mr Webster also denied the plaintiff's version that there were no safety lines and harnesses and confirmed that there would be no point having a safety harness if there were no safety lines attached across the roofs. He also confirmed that he did not climb up a ladder to view the roof at point "Y" so did not see if there were (or were not) safety lines. He was adamant that point "Y" on the building complex was where the incident had occurred.

[63] After being alerted to the incident, Mr Webster proceeded to point "Y" and found the plaintiff lying on the ground inside the warehouse. He called for an ambulance and testified that a first aider²² attended to him, but the plaintiff's injuries were beyond her expertise. According to Mr Webster, the plaintiff was not wearing a mask, hazmat suit, nor a safety harness and was dressed in normal clothes. The foreman, who himself was wearing a harness, was summoned.

²² The first aider was on the PT premises

[64] Mr Webster could not address the plaintiff's testimony that the PPE equipment suits and harnesses were removed by FA two days prior to his fall. He stated that had he been informed thereof, he would have spoken to Mr Pietersen or Mr Fourie and halted the work until the equipment was returned and a safe working environment/premises was restored. Common sense informed him that if you work at heights, you take certain precautions.

[65] As for the skylights, he testified that FA had marked off the skylights with sticky tape across the skylight. Mr Webster testified that from underneath²³, meaning inside the warehouse building, he could see fungal growth on the skylights and they (the skylights) were lighter in colour than the roofs. He admitted that he was not up on the roofs so could not comment on the plaintiff's statement that the colour of the skylights and roofs were similar. Notwithstanding the latter testimony, Mr Webster stated that one could not be mistaken as the polycarbonate skylights were distinguishable from the roof.

[66] Mr Webster testified that Mr Pietersen conveyed to him that he would report the incident as he/FA was the plaintiff's employer. Mr Webster considered that in terms of the mandatory agreement, the OHS Act would be complied with.

[67] During cross-examination, Mr Webster, when questioned about whether PT had a document in place in respect of the health and safety requirements, testified that he did not recall but that PT had complied with the OHS Act. With regard to the mandatory agreement, Mr Webster could not recall whether PT/he were satisfied as to the budget for health and safety measures for the duration of the contract.²⁴ He could not dispute the plaintiff's testimony that on some days, the workers did not have hazmat suits and PPE equipment though he was not aware of this.

[68] Mr Webster explained that initially there was a safety committee on the premises, but conceded that the safety and condition of PT's roofs was not really a concern of the safety committee which dealt mainly with "housekeeping" issues. Furthermore, he was unable to confirm that the clauses in PT1, were in conformity with the OHS Act. The

²³ Inside the warehouse building

²⁴ Exhibit A, PT1, par 3, p35

introduction of PT1 was read out to Mr Webster²⁵ and he was asked about the company's (PT) health and safety requirements and rules and regulations and admitted that he was unsure whether PT had a document setting out the company's health and safety requirements.

[69] Furthermore, Mr Webster did not satisfy himself as to whether the mandatary had made adequate financial provision for health and safety, when he forwarded FA's quote to PT's chief executive officer for approval. With reference to PT1, Mr Webster conceded that clause 3 dealing with "warranty of compliance" was confusing and that PT had not checked up on FA and/or Mr Pietersen prior to accepting the quote. He assumed that FA had performed the kind of work agreed to many times and that *"they had everything in order"*²⁶.

[70] After the plaintiff's fall, Mr Webster spoke to Recardo (the foreman) and thereafter to Mr Pietersen. When he reported to Recardo and Mr Fourie that the plaintiff was not wearing a hazmat suit and harness, their response was that the plaintiff should not have been on the roof. He testified that Recardo, who came upon the plaintiff in the warehouse when alerted to the incident, was wearing a harness. Mr Webster was unaware whether Mr Petersen reported the plaintiff's fall to the factory inspector or whether FA's investors paid out on the insurance.²⁷

[71] Notwithstanding his response that he could not comment on the plaintiff's version that the suits and harnesses were removed two days prior, Mr Webster's view was that he found it hard to believe that the plaintiff would be happy to go onto the roof without a harness. He understood though that, as counsel put it, *"the average man on the side of the road needs to earn his crust"*²⁸.

[72] Nonetheless, the witness's view was that as the plaintiff had worked with FA for quite some time prior to the fall, he was/would be aware of FA's rules and regulations. Mr Webster conceded that FA's rules and regulations (regarding employees, health and

²⁵ Exhibit A, p35

²⁶ Transcript, p481

²⁷Exhibit A, p47 (FA's Old Mutual policy)

²⁸ Transcript, p484

safety) were unknown. As far as supervision, discipline and reporting were concerned,²⁹ he presumed the foreman of FA would be responsible therefor.

[73] Mr Webster and Mr Pietersen signed PT1 on behalf of the respective defendants, and as for the quotations, Mr Webster could not explain why FA's two quotes were almost a year apart. He understood that PT was being quoted for the "*removal of old dirty fibreglass and yellowed plastic sheets and fitting of new polycarbonate sheets in their place*".³⁰ The quotation was for the entire roof area of PT³¹.

[74] According to Mr Webster, Mr Pietersen inspected the roofs of the buildings shown as situated between points "A" and "Y" on Exhibit B. When asked about the "*roof cleaning*" description in PT1³², he stated that neither he nor the CEO of PT knew what the company's working at heights regulations were.

[75] In respect of the AIA Report, Mr Webster agreed that the report does not refer to working at heights nor regulations related thereto. Furthermore, he agreed with the plaintiff's counsel's statement that the purpose of such report related to the cleaning and removal of asbestos.

[76] With reference to the two quotes, it was put to Mr Webster that it was unclear why FA quoted twice: in quote 2 of 29 July 2012, additional amounts for bird proofing and repairs to vents were quoted, yet these items/work were quoted for in the 2 June 2012 quote³³. Mr Webster was unclear why this was the case.

[77] With regard to the skylights, and the two quotes, Mr Webster was unable to indicate when it came to FA's attention that it (FA) were not only removing old, dirty fibreglass and yellowed plastic sheets and replacing these with polycarbonate sheeting (quote 1) but were also to remove and replace broken and damaged fibreglass and plastic sheets (quote 2).

²⁹ Par 6, PT1, p35

³⁰ First quote, Exhibit A, p50

³¹ This includes all the buildings, and points A, X, Y and Z, Exhibit B

³² PT1, Exhibit A, p52

³³ PT1, Items (b) and (e), p50

[78] Mr Webster stated that he was not initially aware that there were broken and damaged fibreglass and plastic sheets on the roofs and admitted during cross examination that neither he nor PT brought any broken and damaged fibreglass or plastic sheet skylights to anyone's attention. He clarified that on the day of his visit prior to quoting for the work, he showed Mr Pietersen the roofs then left him to do his assessment.

[79] Various Regulations were put to Mr Webster and are not repeated in the judgment for the sake of brevity. Mr Webster admitted that PT did not prepare the health and safety specification for the work³⁴ because PT relied on FA to "*do a job in terms of whatever regulations were enforceable*"³⁵. He explained further that PT relied on the fact that FA were a reputable construction company and had knowledge of the legislation and relied on FA in respect of issues related to the roofs such as construction issues and condition.

[80] In respect of Regulation 4(1)(b)³⁶, Mr Webster indicated that the only information brought to the attention of FA was the AIA report and he admitted that the latter report did not refer to broken or damaged skylights, not working at heights and the requirements applicable thereto. Furthermore, with reference to Regulation 4(1)(d), Mr Webster also admitted that monthly audits to ensure that PT's health and safety plan were implemented, were not done officially. There was only unofficial contact with FA as to the progress of the project.

[81] In respect of Regulation 5(1) he stated that PT was not provided with a health and safety plan by FA. Furthermore, PT did not comply with Regulation 4(2) in that there was no negotiation with FA regarding the contents of the health and safety plan contemplated in Regulation 5(1), nor was there compliance with Regulation 4(3).

[82] In respect of Regulation 4(4), Mr Webster admitted that he did not speak to any references nor previous clients of FA prior to contracting with the latter. He concluded that FA was a reputable firm in view of his reliance on Ms Keet's reference and the

³⁴ Regulation 4(1)(a), 2003 Regulations

³⁵ Transcript, p512

³⁶ The client shall promptly provide the principal contractor/its agent with any information which might affect the health and safety of any person at work carrying out construction work.

standard of their work on other projects. Furthermore, Mr Webster candidly stated that the Construction Regulations were not complied with because he was unaware of them at the time and had relied upon the AIA Report and FA's knowledge of the Regulations and their guidance.

[83] When pressed, he admitted/conceded that he/PT assumed that FA knew the Regulations. He agreed with the plaintiff's counsel that the agreement, PT1, did not deal with the Regulations referred to earlier. He also did not disagree with the statement that in view of its failure to address and include the Regulations, therefore the mandatory agreement was not in compliance with the OHS Act. Mr Webster testified that he was unaware at the time, of PT's statutory obligations and relied on FA which was contracted to carry out a job.

[84] He also admitted that nobody at PT in the 25 years that Mr Webster was employed there, had received training in health and safety. The reason for obtaining quotes for asbestos removal on roofs was because he became aware that legislation regarding asbestos and their risks had changed and thus he alerted the CEO thereto, and he was given the green light to source quotes and obtain an AIA report. He frankly admitted that PT did not undergo any "conscientizing" about health and safety.

[85] PT was able to afford to comply with the health and safety Regulations at the time but nobody at PT ensured that the contract with FA complied with the Regulations. Initially, when FA started, Johan Fourie represented the latter, but Mr Webster was introduced to the foreman Recardo, who would deal with day-to-day issues. He confirmed that there were eight to nine workers and he had on an occasion seen a worker without a hooked-up harness and took it up with Recardo which resulted in the situation being rectified immediately.

[86] According to Mr Webster, it was FA's responsibility to secure safety lines to the buildings and to ensure a safe working environment on the roof. Mr Webster confirmed under cross examination that he did not inspect the roof where the plaintiff stated he fell through nor check to see if there was a safety line attached to that building³⁷.

³⁷ Identified as the building marked with "X", Exhibit B

[87] Mr Webster also conceded that it was never put to Dr du Toit that there was a hazard tape to denote the skylights. Mr Webster saw the tape on the area of the two buildings opposite the building marked “X”, which was not where the plaintiff stated that he fell through the skylight.

[88] In re-examination, Mr Webster testified that he never felt it necessary to inform Mr Pietersen that what he was looking up at, were skylights and that there was thus a fall hazard there. He assumed that Mr Pietersen, in his experience in working at heights, would appreciate the heights problem, but admitted, that he had made such assumption as to FA’s expertise and knowledge.

Material issues in the matter

[89] One of the challenges in this matter is that the main role players in the parties’ versions were never called as witnesses: Recardo the foreman, Mr Fourie the supervisor and the first aider on the scene after the plaintiff’s fall. I appreciate that Recardo and Mr Fourie would potentially have been witnesses for the second defendant, FA, and could have been subpoenaed, but the absence of possible corroboration and clarity on certain alleged facts regarding the fall protection equipment and safety lines, has been problematic.

[90] Another difficulty is that the contractor, FA, never participated in the trial, which created a situation where the question of the supply or removal of PPE/harnesses, and the absence or not of safety lines on the building where the plaintiff fell through, all turns on what the most probable version was. This is not a matter where it can be said that any of the three witnesses in the trial – the plaintiff, Dr du Toit and Mr Webster - were bad or evasive witnesses. The fact that the plaintiff was unsophisticated has, in my view, little bearing on my findings as to the acceptance or otherwise of his version. Ultimately, as far as the working conditions, state of the roof(s) and the incident are concerned, one is left with the testimonies of the plaintiff and Mr Webster. As an expert, Dr du Toit’s testimony was largely about the relationship between the defendants and the obligations in terms of the Regulations. His testimony is accepted.

[91] While much was made of the various Construction Regulations, in my view, the case turns largely on the following issues: the probabilities of the plaintiff's version (as referred to above), negligence, causation and whether there was contributory negligence on the plaintiff's part. It goes without saying that the parties were not at liberty to stray beyond their pleadings.

[92] The first consideration is whether the plaintiff has managed to prove on a balance of probabilities, that he was not provided with adequate or any fall arrest equipment, and that there was no safety line on the roof, which resulted in his fall through the skylight. Significantly, counsel for the plaintiff, at the commencement of closing submissions, disavowed a reliance on the statutory Construction Regulations as a basis for stating that the defendants are liable to the plaintiff for damages which he pleads he incurred because of the incident.

[93] The plaintiff's counsel submitted, however, that the statutory Regulations must be considered against the backdrop of the conduct of the defendants in the matter, and in this respect, I agree with the submission. That said, regard must still be had to the basis upon which the plaintiff pleads that each or both defendants were negligent, which negligence resulted in his fall to the ground. Counsel for the first defendant, on the other hand, submitted that the first hurdle which the plaintiff was required to overcome was to prove on a balance of probabilities that he was not provided with adequate fall protection on the day of the incident. This submission is also correct.

Failure to provide the plaintiff with fall arrest equipment and a safety line

[94] It bears emphasising that the plaintiff's case, as pleaded, is that a legal duty was imposed on the defendants to prepare a health and safety plan, to discuss and negotiate such plan and to comply with Regulations 5(1) read with 4(1)(d) and 4(1)(e) respectively. As alluded to above, I shall accept that the applicable Construction Regulations at the time were the 2003 Regulations.

[95] It is further pleaded that the defendants breached their duty to the plaintiff when they failed to ensure that he was not exposed to hazards when they knew or ought to

have known that it was dangerous to allow him to work at an elevated level without fall arrest equipment. The plaintiff further relies on the common law when he pleads that PT and/or FA failed to take any or adequate steps to prevent him from falling through the roof when they could and should have done so.

[96] PT, as the client and owner of the premises, denies that the contractor failed to provide the plaintiff with adequate fall arrest equipment on the day of the incident. Instead, its case is that Mr Fourie supplied the plaintiff with such equipment but that he (the plaintiff) had failed to wear it or removed it prior to his fall and thus, the plaintiff's own conduct was the proximate cause of his fall; alternatively, it amounted to a *novus actus interveniens*, alternatively, it constituted a voluntary assumption of risk³⁸. The first defendant pleads further that FA and the plaintiff were contributorily negligent in the circumstances.

[97] The plaintiff was the only witness other than Mr Webster regarding the events of 13 March 2014. It was undisputed that he was one of eight or nine workers employed by FA to clean and maintain the roofs on the PT buildings as shown on Exhibit B, for the duration of the project. It was also not disputed that half the team would work on one building and the other half would work on another building. A most crucial part of his case was that the contractor had removed the harnesses two days prior to his fall and thus there was no safety harness to wear while on the roof and furthermore, there was no safety line either.

[98] In my view, it was insufficient for the plaintiff to prove, on a balance of probabilities that on other roofs depicted on Exhibit B, there were no safety lines attached for workers to clip their harnesses into place. While this may be relevant in the assessment of whether he discharged the onus of proof, the plaintiff was required to prove on the probabilities that on the morning of the incident, there was no safety line on the roof he worked and walked on and no harness worn as they were unavailable.

[99] Having ring-fenced what the plaintiff was required to prove, the assessment as to whether he discharged this onus resting on him, follows. Due to his work on other projects for FA, it is accepted that the plaintiff was familiar with the fall arrest equipment

³⁸ Further Amended Plea, A15-A16

as he had worked at heights prior to this incident, and I also accept and find that he was aware of the necessity and significance of having to use such equipment when working at a height on a roof of a building.

[100] Whether there was only one toolbox talk by Mr Fourie or daily talks prior to the workers starting their tasks for the day, the evidence indicates that FA indeed provided toolbox talks to alert the workers, including the plaintiff, to the necessity of using fall arrest equipment including a harness. The plaintiff's denial that he did not heed the toolbox talks, as pleaded by PT, was consistent, and there is no further evidence in the trial to suggest that he ignored Mr Fourie's explanations and demonstrations.

[101] From the evidence considered holistically, it is accepted that the plaintiff was not wearing a safety harness on the day he fell. This version is confirmed by Mr Webster who testified that he arrived on the scene in the warehouse to find the plaintiff lying injured on the ground without a harness and PPE gear, and wearing normal clothes. The plaintiff also pleads that he was not wearing fall arrest equipment on the morning in question.

[102] The question then arises as to how it came about that the plaintiff was without a harness on the morning of the incident. The plaintiff's case is that he was not provided with a harness as the harnesses were removed by the contractor two days prior and that he witnessed the removal from the storage area on the site. His version that the fall arrest equipment was removed from site was not contradicted by Mr Webster, who had no knowledge of such removal.

[103] This is unsurprising as on Mr Webster's version, even though he walked around the buildings once a day and climbed ladders mounted against buildings every three to four weeks to check the progress of the roof work, he could not gainsay the plaintiff's version regarding the removal of harnesses. There was also no evidence led to establish any kind of timeline as to the whereabouts of Mr Webster on the day of the incident.

[104] To add, Mr Webster recalled an incident prior to the plaintiff's fall where he saw a worker on the roof without a harness and he immediately alerted Recardo about this failure. The work was immediately halted, the situation rectified and apologies were

offered to Mr Webster/PT. It is evident from this testimony, considered with that of the plaintiff, that there was on PT's version, at least one occasion where a harness was not worn by a worker who was working on a roof, though the reason is unknown.

[105] Aside from the above, Mr Webster's testimony was that removal of PPE from the site two days prior to the plaintiff's fall, was never mentioned to him either by Mr Pietersen or Recardo. Then again, Mr Webster was also not informed that on an occasion, a worker was allowed on the roof³⁹ without a harness.

[106] Added to the above factors, the plaintiff's testimony that on some days, the workers did not have hazmat suits and harnesses to wear remained consistent throughout his testimony including lengthy and persistent cross examination. Furthermore, Mr Webster testified that on arrival at the injured plaintiff, he was later met by Recardo who was wearing a harness. The submission by PT's counsel was along the line that if Recardo, the foreman, wore a harness, then the plaintiff's version regarding removal and thus unavailability of harnesses, was questionable.

[107] On the plaintiff's version, the removal and unavailability of PPE and harnesses was raised with other workers and Recardo. The plaintiff testified that despite the workers talking about the lack of provision of safety equipment, Recardo and/or Mr Fourie seemed not to have remedied the situation. Once again, there is no evidence to contradict this version of events, which leads me to the following query: if Recardo/Mr Pietersen/Mr Fourie had intervened regarding the "missing" harnesses and PPE, by all accounts it would have been expected that work on the roofs would be halted until the harnesses were returned or replaced. Furthermore, had the work been halted, Mr Webster would have testified so, but aside from one incident referred to above, there was no evidence that work was halted because FA had to obtain replacement harnesses or the like.

[108] The picture painted by the plaintiff, which was not contradicted, was that safety equipment was held at a lock up garage on the PT site and sporadically provided to the

³⁹ Presumably with other workers as they were split into two teams

workers, who were at times seen without harnesses. Mr Webster could not dispute the plaintiff's version that on some days, workers did not have hazmat suits and harnesses.

[109] This brings me to Mr Webster's testimony that when he came upon the injured plaintiff on the warehouse floor, he later saw Recardo who was indeed wearing a harness. Counsel for PT has argued that if regard is had to this evidence, then the probabilities of the plaintiff's version are questionable. In my view, it is not so straightforward. The evidence of the two witnesses, must be considered objectively and holistically, as opposed to focussing on one aspect to bolster a view that the plaintiff's version is improbable.

[110] To clarify, it must be remembered that while Mr Webster did a daily walk-about, he also stated that he only climbed a ladder every three to four weeks to check the progress of the work and did not climb onto the roofs. Secondly, there is no evidence to suggest that Mr Webster saw Recardo earlier the morning on the building "X" where the plaintiff says he was when he fell. Thirdly, the workers worked in two teams, with one team on one building and the other team on another building.

[111] No evidence was presented that Recardo was on the same roof (and therefore the same work team) as the plaintiff. In fact, the testimony of Mr Webster that he called Recardo from the warehouse when he was alerted to the plaintiff's fall, supports the more probable view that Recardo and the plaintiff were not on the same building prior to the plaintiff's fall. The point is that it cannot simply be concluded that because Recardo was seen to be wearing a harness, therefore there must have been a harness available for the plaintiff and he either failed to wear it or removed it prior to the fall.

[112] In view of the above assessment of the evidence, I find that the plaintiff's version as to the removal of harnesses prior to the incident is the more probable version and cannot be discounted. While counsel for PT argued that it would make no sense for the contractor to remove this equipment given the contract concluded with PT, the submission is unsubstantiated by any evidence presented at the trial and opens the door to speculation. Furthermore, Mr Webster's version that Recardo and Mr Fourie made certain utterances to him about the plaintiff being on the roof without a harness, was never independently corroborated.

[113] In respect of the plaintiff's version that there was no safety lines attached to the building, Mr Webster, during his walk-about, observed that there were safety lines but not attached to all the buildings forming part of the complex seen on Exhibit B. Mr Webster did not have independent knowledge of safety lines and thus, could not, in my view, dispute the plaintiff's version that at the building marked "X", where he maintained he fell, no safety lines were attached to the building.

[114] Aside from the plaintiff agreeing that there would be no point in wearing a harness if there was no safety line to attach it to, there is no other evidence to gainsay the plaintiff's version regarding no safety lines on building "X". At the same time, and despite the potentially illogical (though dangerous) situation where a worker would wear a harness knowing that there was no safety line to which he was to attach it, if the probabilities indicate that PPE was removed to take to another site, then it is not a far stretch to conclude on the probabilities that it was not strange that some buildings would not have safety lines.

[115] In the normal course of working at heights the suggestion of "no harness but a safety line", and *vice versa*, seems illogical but in the circumstances of this matter and having the benefit only of Mr Webster and the plaintiff, whose version was not so improbable when considered against the peculiar facts of the case, the conclusion does not seem so unrealistic.

[116] I agree with PT's submission that it would have made little sense for FA to have complied with its legal duty to provide fall arrest equipment to workers on some days, but not on others, but the problem is that there is no version from the contractor to shed more light on the issue. Mr Webster was clearly not available 24/7 to check on the workers, and on his own admission, stated that safety lines were not attached to all the buildings.

[117] On the aspect of Dr du Toit's lack of knowledge that the plaintiff had no harness (due to its removal from the site) and there being no safety lines attached to building "X", it is correct that he was only made aware of this during the trial, for reasons unknown to the Court. However, I accept that had he been aware of these aspects of the plaintiff's case, Dr du Toit would have included it in his report.

[118] As the essential averment and facts upon which the plaintiff relies in respect of liability against FA is that he was not provided with adequate fall arrest equipment by them at the time of the incident, in view of the above discussion, and the pleadings, I find that the plaintiff has proved on a balance of probabilities that no fall arrest equipment (harness) was supplied or made available to him by FA on the morning of the incident and no safety lines were secured on the building on which he fell through the roof.

The contractor's liability

[120] I agree with the submission by PT's counsel that from the plaintiff's pleadings, the liability of FA is simply that it failed to provide him with fall arrest equipment. As set out above, having found that his version is the more probable, and hence it follows that the plaintiff has established that FA failed in its duty to him as pleaded in paragraph 9 of the amended Particulars of Claim. In this regard, the plaintiff has succeeded in showing a wrongful omission by FA toward him.

[121] In the result, it is found that the plaintiff has proved on a balance of probabilities that FA breached its duty toward him by allowing him to work at a height and in an elevated position on the roof of a building and thus exposing him to hazards in such an environment, without the use of fall arrest equipment to prevent him from falling.⁴⁰ Accordingly, the further finding is that the plaintiff has established that FA failed to take any or adequate steps to prevent him from falling through the skylight of the roof when it could and should have done so. Accordingly, the plaintiff's claim against the second defendant on the merits, succeeds.

The liability of Prima Toys

[122] In respect of the first defendant, the position is slightly different. The plaintiff's pleaded case on the reliance of the Construction Regulations and breach of the OHS Act does not create liability in delict although, in terms of section 37(1) of the Act, there

⁴⁰ Dr du Toit's evidence, which is accepted, is that FA was required to appoint a construction safety officer in terms of Regulation 6(6) which it failed to do; and it was required to do a risk assessment in respect of working at heights, which it also failed to do.

may be criminal sanction upon conviction. While FA was an independent contractor, PT cannot be held vicariously liable for the conduct of the contractor⁴¹.

[123] The liability, if any, which PT has is a personal liability which relates to, generally, a failure to prepare health and safety specifications, the failure to have a health and safety plan in place and the breach of a common law legal duty towards the plaintiff to ensure that he was not exposed to hazards while on the roof. In respect of PT, as owner of the premises, the hazard relates to the danger caused by skylights which were covered by dirt and moss as the plaintiff pleads and broken and damaged skylights and the consequence of stepping on such skylight.

[124] A defendant owes a duty of care to a plaintiff if he is a person in respect of whom harm may reasonably be foreseen⁴². The parties referred to ***Langley Fox Building Partnership (Pty) Ltd v De Valence***⁴³, a judgment in which the SCA considered the contractual relationship between a building contractor and sub-contractor but where the principles largely also apply to the relationship between a principal/employer and an independent contractor. In applying the test to determine the existence of a duty of care in a particular case, Goldstone AJA⁴⁴ stated the following:

“In my opinion, it follows from the foregoing that in a case such as the present, there are three broad questions which must be asked, viz:

- (1) Would a reasonable man have foreseen the risk of danger in consequence of the work he employed the contractor to perform?*
If so,

⁴¹ See Law of Delict Seventh Edition Neethling Potgieter Visser p391

⁴² Premier of the Province of the Western Cape v Faircape Property Developers (Pty) Ltd 2003 (2) All SA 465 (SCA) par [42]

⁴³ 1991(1) SA 1 (AD) 37-40 (Saflii version)

⁴⁴ As he was

(2) *Would a reasonable man have taken steps to guard against the danger? If so,*

(3) *Were such steps duly taken in the case in question?*

Only where the answer to the first two questions is in the affirmative does a legal duty arise, the failure to comply with which can form the basis of liability.

It follows from the foregoing 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 in each case upon the facts. It would be relevant to consider the nature of the danger, the context in which the danger may arise, the degree of expertise available to the employer and the independent contractor, respectively, and the means available to the employer to avert the danger. This list is in no way intended to be comprehensive. It does follow, however, that the duty of an owner of premises such as the present may not be the same as that of the building contractor employed by him to do the work. That question, too, must be answered with due regard to the facts.”

[125] Considering the above test in **Langley Fox**, and the facts of the matter, the reasonable owner of the premises would have foreseen the risk of working at heights on the roofs of its buildings in consequences of the cleaning work which it employed FA to do. This is especially so knowing that in terms of the quotes, FA was required to remove old dirty fibreglass and yellow plastic sheets and in terms of the second quote, it was also to remove and replace broken and damaged fibreglass and plastic sheets.

[126] The very nature of the work at a height was dangerous but the added danger lurked in having old, damaged, broken and moss-covered skylights and roof panels on the roofs where the workers generally and plaintiff particularly, worked. A reasonable owner of the buildings in the first defendant’s position, in my view, applying the **Langley Fox** test, would have foreseen the risk of danger inherent in stepping on such skylights.

[127] Would a reasonable owner in the place of PT have taken steps to guard against the danger? In my view, the answer must be in the affirmative. It was insufficient to simply pass off the responsibility of diverting the danger of working on the roofs, to the contractor. The contractor's role, as seen above, was to ensure that the protocol for working at heights was met and that it performed the work as contracted: toolbox talks, demonstrations of the use of harnesses and safety lines, provision of PPE, securing safety lines to the building, ensuring that workers wore the PPE, supervising the work and acting in accordance with the Regulations.

[128] In respect of the second question, the reasonable owner of the premises would have taken steps to guard against the danger. Aside from employing a contractor to do the dangerous work, it would have disclosed the dangers of potentially slippery and moss-covered fibreglass skylights which were old and damaged. Accepting, in view of the earlier finding, that the plaintiff was on the roof without a harness, the undisputed fact is that he fell through the roof when he stepped on a moss-covered skylight. There is no contrary evidence that the skylight was not obscured by moss and/or was not dirty.

[129] The moss-covered, clearly old and possibly broken and damaged skylight posed a risk to anyone who walked on the roof and stepped on the skylight, whether an employee of FA or not, and whether he wore PPE or not. PT's role and responsibility related to the skylights is evident in the evidence by Mr Webster: he did not go up onto the roofs, did not point out the fibreglass skylights to Mr Pietersen and his/PT's actions were limited to standing in the warehouse and looking up at it. At the risk of repeating what was stated when summarising his testimony, Mr Webster confirmed that he saw from inside the warehouse(s) that there was moss on the skylights. This confirms not only the plaintiff's testimony, but also his case as pleaded in the amended Particulars of Claim.

[130] To the extent that PT wished to convey that the skylights were marked and noticeable to all who worked on the roof, my view is that it failed to establish such averment or fact in the trial. Notwithstanding disputed versions as to which building's roof the plaintiff fell from, the plaintiff was consistent in his testimony that he could not distinguish between roof sheets/tiles and the skylight. In my view, it then befell PT to

prove on a balance of probabilities that indeed the skylights on the roof the plaintiff fell from, were clearly marked and distinguishable, thus presenting a warning to all who worked and walked on that roof. PT failed to do so.

[131] The significance of this cannot be underplayed for the following reasons: firstly, in terms of the 2003 Regulations, the first defendant was required to have a health and safety specification in accordance with Regulation 4(1) (a) read with Regulation 1, which entailed a documented specification of all health and safety requirements related to the cleaning and painting of the roofs in order to ensure the health and safety of all persons. In my view, the reference to “persons”⁴⁵ includes the workers such as the plaintiff. Furthermore, “all health and safety requirements” would entail a reference to all hazards, including those related to the skylights. The Regulations are considered against the backdrop of the duty of care and compliance with Regulation 4 was compulsory for the client, PT.

[132] Thus, having regard to **Langley Fox** and Regulations 4 read with Regulation 5, PT had a legal (common law) and also statutory duty to the plaintiff in respect of ensuring health and safety on its premises. Furthermore, Dr Du Toit’s view was that there was a duty on PT as the client to identify anything that posed a risk and certainly, on my understanding, there was a risk of harm associated with the skylights and roof panels.

[133] **Langley Fox** recognises that the duty of an owner of a premises (such as PT) may not be the same as the duty of the contractor⁴⁶. This was clearly the case here. Mr Webster and/or PT were aware of the foreman and workers on the roofs and aware of the inherent danger which the damaged, old and moss-covered skylights posed. The fact that the defendants concluded a mandatory agreement, does not absolve it of its common law duty and added statutory duty toward persons on its premises, such as the plaintiff. It was admitted by Mr Webster that the contract was outdated and defective for want of non-compliance with the health and safety legislation at the time and this view is confirmed by Dr du Toit. Clearly, the mandatory agreement did not disclose the safety issues related to the roof and skylights, nor did the AIA report, which was ultimately

⁴⁵ Regulation 1

⁴⁶ Langley Fox, p13 C

irrelevant in this matter as it concerned asbestos, which is not what this dispute turns on.

[134] Having regard to the above discussion, and in answer to the first two questions in **Langley Fox**, firstly, a reasonable client/owner of the premises would have foreseen the risk of danger in consequence of the work on the roofs which it employed the contractor to perform; and secondly, a reasonable client would have taken steps (as set out above) to guard against it. As the two questions are answered in the affirmative, I am satisfied that the client, PT, owed the plaintiff a legal duty and a secondary statutory duty of care.

[135] In **Chartaprops 16 (Pty) Ltd and Another v Silberman**⁴⁷ the SCA recognised the category of cases where the reasonable person in the employer/client's position is expected to ensure that reasonable precautions are taken to avoid harm from befalling the plaintiff. As discussed in **Chartaprops**⁴⁸, which considered the liability and duty of care of a shopping mall owner *vis a vis* the cleaning contractor, in the circumstances which ensued (water spillage) it was reasonable to expect Chartaprops to take precautions to keep the floors safe and it would be liable if those precautions were not taken by the contractor. It was found that Chartaprops owed a legal duty to shoppers and on the basis set out in the judgment it was found to be liable.

[136] In this matter, the duty of care owed by each of the defendants toward the plaintiff is different. The existence of the first defendant's duty to prevent harm depends on a consideration of: the nature of the danger, which was that someone could slip and walk on a moss-covered, old, damaged and broken fibreglass skylight on the roof; the danger could arise when someone working on the roof walks on/upon the skylight which in all probability would have been vulnerable due to age, breakages, wear and tear; the client was in a position to afford to pay for a roofing or construction expert to attend to an assessment of the roof, roof tiles and skylights, but failed to do so; and, the client had the means available to avert the danger by providing a report on the conditions of the roof, by pointing out the skylights, by itself inspecting the roof and by clearly marking

⁴⁷ [2008] ZASCA 115 para [14]-[15]

⁴⁸ Par [18]

the dangerous areas on the roof. The first defendant failed to acquit itself of its duty to the plaintiff in these circumstances.

[137] I agree with the plaintiff's counsel that the liability of the first defendant comes down to an issue of foreseeability. Furthermore, the defendants were clearly pre-occupied with working with asbestos, yet as far as the first defendant went, no consideration was given to the unsafe conditions on the roof, as described above. Having regard to **Langley Fox, Chartaprops** and **Cenprop Real Estate v Hotlzhausen**⁴⁹, this is a case where, having regard to the roofing and skylight conditions and the dangers it posed, the client was personally at fault. The duty of care related to the latter conditions did not rest with the contractor.

[138] In my view, the failure to alert the plaintiff and other workers to the risks on the roofs including slippery tiles and dangerous skylights, in circumstances where, according to the **Cenprop**⁵⁰, the client/principal was clearly wrong, leads me to conclude that the first defendant was negligent in relation to the plaintiff's harm or injury. Accordingly, I also agree with the plaintiff's submission that the nature of the danger was proceeding on a roof where skylights looked virtually identical to the roof sheets. The application of tape to identify the skylight was not visible to the plaintiff on the top of the roof so does not assist the first defendant.

[139] The plaintiff led evidence on the roof conditions, and not merely non-compliance with the Regulations. If anything, the non-compliance with the Regulations certainly supports the view that PT had a general disregard for the safety issues related to the state of the roof. The reasonable person in the position of Mr Webster/ Prima Toys would have foreseen the dangers posed by walking and working on the unsafe roofs, but it did highlight this in its agreement with the contractor.

[140] In failing to act positively as set out above, PT's conduct amounted to an omission which is wrongful⁵¹. In determining whether PT was negligent, regard is had to the test

⁴⁹ 2023 (3) SA 54 (SCA) par [26]

⁵⁰ Supra

⁵¹ Principles of Delict, p84

for negligence as set out in **Kruger v Coetzee**⁵²: liability of the defendant arises if a *diligens paterfamilias* in the position of PT would foresee the reasonable possibility of his conduct injuring another and causing him patrimonial loss; and would take reasonable steps to guard against such occurrence and the defendant failed to take such steps.

[141] In my view, the above questions must be answered in the affirmative. As the owner of the building, and having regard to the Regulations referred to, PT ought to have known that there were broken, damaged and old fibreglass skylights covered in moss, and would have foreseen the reasonable possibility that its failure to point these out to workers such as the plaintiff and people on the roof, created the risk of harm or injury when someone walked upon the skylights. A reasonable owner in PT's place would have alerted the plaintiff thereto and PT did not do so. It simply left the roof in its entirety to the contractor, which was not a roofing expert nor construction expert, but an asbestos cleaning business. In light of the discussion and findings above, the harm to the plaintiff (and others) was foreseeable and PT, in not taking the various precautionary measures to ward off the harm to the plaintiff, acted negligently in relation to the plaintiff.

[142] The enquiry does not end there because causation must be considered. PT pleads that it is the plaintiff's conduct in removing the PPE or failing to wear it which was the proximate cause of his fall which broke the causal *nexus* between any wrongful and negligent conduct ascribed to it and the plaintiff's fall⁵³. Furthermore, such conduct constituted a *novus actus interveniens* and/or a voluntary assumption of risk by the plaintiff, who at all material times knew of and fully appreciated the danger of falling from an elevated position on the roof in the absence or wearing fall protection equipment. In so doing, he voluntarily assumed the risk of falling.

[143] Is there a causal connection between PT's negligent conduct in failing to alert/highlight/draw attention to the risks associated with the old, moss-covered, damaged and broken skylights, and the plaintiff's injuries? In **Minister of Police v**

⁵² 1966(2) SA 430 E-G

⁵³ Par 7.1A.3, A15, Further amended Plea

Skosana⁵⁴ the SCA identified factual causation as relating to *“the question whether the negligent act or omission in question caused or materially contributed to... the harm giving rise to the claim”*⁵⁵ If it did, then the second question is whether the negligent act or omission is linked to the harm directly or sufficiently close enough for legal liability to follow or whether the harm is too remote.⁵⁶

[144] Insofar as factual causation is concerned, the *“but for”* test applies. In this respect, I have to enquire whether the harm to the plaintiff would nonetheless have ensued even if the omission (PT’s failures regarding the condition of the roof and skylights) had not occurred. This presupposes applying a hypothetical scenario as to what probably would have happened but for the wrongful conduct of PT. Here, I am required to super-impose PT’s unlawful conduct/omission for (its) lawful conduct and ask whether, in such a case, the plaintiff’s fall would have occurred or not.

[145] Applying this exercise: if PT had alerted the plaintiff and/or pointed out the conditions on the roof, including the slippery, old, broken and damaged skylights and included these references in PT1 and in a health and safety plan for working at heights, and clearly marked out the skylights, would the plaintiff’s loss have ensued or not? The answer must be No. The plaintiff would have been alerted to the clearly identified skylights covered in moss, which would have been distinguished from the roof tiles. In such a hypothetical scenario, and had he been keeping a proper lookout as to where he was walking, the plaintiff would not have stepped on a skylight, and had he not stepped upon it, his step or impact thereon would not have caused it to give in/break and he would not have fallen through the roof.

[146] The second enquiry is whether the wrongful act/omission is sufficiently closely or directly linked to the loss for legal liability to arise or whether the loss is too remote.⁵⁷ From the facts of this matter, the conduct of PT amounted largely to omissions and had it acted positively (and pro-actively, as opposed to supinely relying on an AIA report and

⁵⁴ 1977(1) SA 31 (A) 34-35

⁵⁵ 34-35

⁵⁶ Principles of Delict, Third Edition, JC van der Walt and JR Midgley, p197; International Shipping Co (Pty) Ltd v Bentley 1990(1) SA 680 (A) 700

⁵⁷ International Shipping Company (Pty) Ltd v Bentley [1990] 1 All SA 498(A) 700E-701A

an asbestos cleaning contractor), the plaintiff would not have walked onto the skylight and fallen through.

[147] There would, in my view, have been no situation where he would step onto a dangerous, unreliable and possibly fragile skylight, which gave way under the plaintiff's weight. He explained that his leg had vanished, indicating that likely, the skylight was not only moss-covered, but probably old and damaged. In the event that PT had employed an expert in roofing or construction or even an expert in skylights, the risks would have been identified, assessed and been known. It did not do so. In the circumstances, I am satisfied that the omissions are closely linked to the plaintiff's loss for legal liability to arise.

Contributory negligence of the plaintiff

[148] There remains the issue of the plaintiff's conduct in entering upon the roof without fall arrest gear. I do not repeat my findings regarding the issue of the gear which on the probabilities, I found were not made available to him and so too the absent safety line. It is, in my view, a useless exercise to ask "*what would have happened had the plaintiff not been on the roof*"?

[149] The authorities referred to above and the academic work referenced in a footnote, make it clear that causation must be approached logically and with reference to the peculiar facts and circumstances of a case. The fact is that the plaintiff was on the roof without PPE gear and walked upon a skylight, the conditions of which should have been made aware to him, and had he not been on the roof in the first instance, there would have been no claim.

[150] In my view, the issue is not that the plaintiff voluntarily assumed the risk when he was on the roof without a safety harness, nor that the failure to wear fall arrest equipment constituted a *novus actus interveniens*. The issue is, and the conclusion reached, is that even if he wore a harness attached to a safety line, he would still have (hypothetically speaking) walked upon an obscured, dirty and probably damaged or broken skylight,

which would have given in under the impact of his weight and he would still have gone through the skylight and the roof.

[151] The safety harness, had it been worn and attached to a safety line as required, would have arrested his fall and stopped the plaintiff from plunging to the ground below and landing on the cement floor, which resulted in injury. However, it must be emphasised that even wearing a harness, the plaintiff would have plunged through the skylight, though (logically-speaking) certainly not as far down to the cement ground as was the case. How far he would have plunged and whether he still would have sustained minor injuries is unknown and calls for speculation.

[152] It must be remembered, even in the circumstance where I have found on the probabilities that no fall arrest equipment was made available to the plaintiff on the morning of the incident and no safety line was secured, the plaintiff certainly knew that he was not allowed to work at an elevated position without fall arrest equipment. Yet, notwithstanding the absent safety gear, knowing the dangers of working at heights due to his experience in similar jobs, and having been privy to toolbox talks, the plaintiff forged ahead and entered the roof without protective gear.

[153] There is no evidence to indicate that the plaintiff failed to keep a proper lookout on the roof and there is no basis to infer such conduct from the evidence. The plaintiff's conduct, in entering the roof area when he had no safety gear available to him, was negligent and this negligence was causally connected to the loss which he had suffered and certainly contributed to it⁵⁸.

[154] Ultimately, there is no evidence to contradict the plaintiff's version as to the state of the roof including the skylights. In comparing the respective degrees of negligence of the first defendant and plaintiff, the extent of each of these parties' negligence in causing the damages to the plaintiff has been discussed above. The defendants' omissions as described above bear a slightly greater portion of the liability in the circumstances and an appropriate apportionment follows.

⁵⁸ South British Insurance Co Ltd v Smit 1962(3) SA 826(A); Amler's Pleadings, Tenth Edition, LTC Harms and MR Townsend p278

Costs

[155] Lastly, on the issue of costs, the matter in my view, was by no means straight forward and has certainly been challenging, especially having regard to the issue related to the Regulations, the differentiation between the defendants' liability and the consideration of the plaintiff's own conduct.

[156] Having regard to Rule 67A and the observations and findings of Wilson J in ***Mashavha v Enaex (Pty) Ltd***⁵⁹, the matter certainly presented some complex issues, and I am of the view that an award of costs, jointly and severally, with counsel's fees on scale C is warranted.

Order

[157] Accordingly, the following order is granted:

- a. The defendants are liable to the plaintiff, jointly and severally, the one paying the other to be absolved, for 60% of his proven or agreed damages.
- b. The defendants are liable to pay the plaintiff's party and party costs, jointly and severally, the one paying the other to be absolved (counsel's fees on scale C).
- c. The trial on quantum is postponed *sine die*, pending the completion of the pre-trial and/or case management process on *quantum*.

M PANGARKER
JUDGE OF THE HIGH COURT

⁵⁹ 2025(1) SA 466 (GJ) par [25]-[27]

Appearances

For Plaintiff: Adv P Eia

Instructed by: A Batchelor Attorneys
Cape Town

For Defendant: Adv T R Tyler

Instructed by: Dicks van der Merwe Attorneys
Cape Town