



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

JUDGMENT

Not reportable

Case no: A221/2024

Court a quo: 16349/2017

In the matter between:

VERNA MERSHALL MANUEL

Appellant

And

SUPERCARE SERVICES GROUP (PTY) LTD

Respondent

Coram: Da Silva-Salie et Slingers JJ et Njokweni AJ

Heard: 29 August 2025

Delivered: 18 November 2025

Summary: Delictual claim for damages – slip and fall – shopping Mall liability for undetected spillages – quiescence – deeming provisions – legal duty - liability of cleaning contractor expressly excluded – *res ipsa loquitur* – chartaprops principle considered – negligence – public policy considerations – appeal dismissed.

ORDER

- 1 The appeal is dismissed.
- 2 Appellant shall pay the respondent's costs of the appeal (which shall include costs of the application for leave to appeal), with counsel costs to be on scale B.

JUDGMENT

Njokweni AJ:

INTRODUCTION

[1] This is an appeal against the whole of the judgment and order of the Court *a quo* of 18 March 2014, *per* Maher AJ dismissing appellant's delictual claim. The appeal is with leave of the court *a quo*.

RELEVANT FACTS

[2] On 9 November 2016, Ms. Verna Marshall Manuel (the appellant) visited Zevenwacht Mall, Kuilsriver, Cape Town ("the Mall") when she slipped and fell on (what is believed to be) a chip in a walkway fracturing her wrist ("the incident").

[3] The Mall is owned by Investec Properties (Pty) Ltd ("Investec"). Broll Property Group (Pty) Ltd ("Broll") was contracted by Investec to manage the Mall, including cleaning and maintenance. In turn, Broll appointed Services Group (Pty) Ltd ("Supercare") as an independent cleaning contractor to provide cleaning services at the Mall.

The appellant's pleaded case

[4] Appellant alleged that Broll and Supercare had a legal duty to her to ensure, *inter alia*, that the Mall surfaces were kept dry and free of slippery substances and that adequate measures were taken to prevent harm arising to anyone (in particular the appellant). The appellant further averred that Broll and Supercare could and should have prevented the incident by exercising reasonable care and/or skill and/or diligence by timeously spotting the "slap" chip on the floor of the Mall and remove it. Broll's and Supercare's failure to do so was wrongful and unlawful.

[5] Appellant pleaded further that Broll and Supercare negligently failed to exercise reasonable care and/or skill and/or diligence by not timeously spotting the “slap” chip on the floor of the Mall and removing it. As a result, she slipped on the spilled chip and fell thereby injuring her wrist.

[6] The appellant contends that because the incident is admitted by both Broll and Supercare the inference or evidentiary principle of *res ipsa loquitur* principle is applicable to this matter and thus negligence against Broll and Supercare should be inferred. *Broadly stated, res ipsa loquitur* (the facts speak for itself) is a convenient Latin phrase used to describe the proof of facts which are sufficient to support an inference that a defendant was negligent and thereby to establish a prima facie case against him. It is not a presumption of law, but merely a permissible inference which the court may employ if upon all the facts, it appears to be justified.¹

[7] Appellant further averred that Broll and Supercare did not have an adequate cleaning system in place to promptly detect the chip spillage and attend to it within a reasonable time and if they had (as they should) could and should have prevented the incident from happening.

The Defendant's pleaded case

Broll's defence

[8] In *Chartaprops v Silberman* 2009 (1) SA 265 (SCA)² it was held that it is permissible for property owners or managing agents to delegate responsibilities like cleaning or maintenance to competent independent contractors. If the delegation is reasonable and the contractor is qualified, the owner or agent can avoid liability for harm caused by the contractor's negligence. In essence, Broll's defence is this: if it is established that Broll has a legal duty to the appellant (which it denied) it fulfilled its legal duty to the appellant by appointing Supercare, a qualified independent

¹ (Zeffertt & Paizes The South African Law of Evidence 2 ed at 219).

² At paras 44-48.

contractor, to handle cleaning and related services at the Mall, to ensure that the floor at the Mall was safe and free of hazards.

[9] Supercare submitted a proposal to Broll on 2 June 2015 to provide cleaning services at the Mall, which Broll accepted on 8 June 2015. In terms of the said proposal, Broll contended, Supercare is solely responsible for detection and cleaning of spillages at the Mall. Broll, contended that the relationship between the parties *apropos* the provision of cleaning services at the Mall is regulated only by the terms and conditions contained in the abovementioned cleaning proposal from Supercare, which it accepted on 8 June 2015. It denied that there is any other agreement (whether oral or in writing) that governs the parties' relationship *apropos* the provision of cleaning services at the Mall. Accordingly, Broll denied that it acted negligently as alleged or at all. It contended that its legal duty was *ex contractu*³ passed on to Supercare. To the extent that Supercare negligently and wrongfully caused harm to the appellant by breach of that legal duty, then Supercare was liable to compensate appellant.

Supercare's defence

[10] Supercare denied it had a legal duty to the appellant as alleged or at all. It pleaded that its duty to detect and clean up spillages was expressly excluded in terms of the unsigned written Master Service Agreement concluded between it and Broll. After Broll accepted Supercare's cleaning proposal on 8 June 2015, Supercare sent to Broll a copy of the Master Service Agreement (MSA) and Transaction Schedule under a cover letter 8 July 2015. The aforementioned letter contained deeming provisions to the effect that: "should the cleaning services commence before the MSA and Transaction Schedule is signed all the terms and conditions of the accepted cleaning proposal (as amplified by the terms of the MSA and the Transaction Schedule) will be deemed to be binding on both parties."

³ According to Broll, this contract refers to the Supercare's cleaning proposal to Broll (referred to in para [8] supra) for the provision of cleaning services at the Mall dated 2 June 2015 and which Broll accepted on 8 June 2015. Broll contended that agreement is the only document that contain the terms and conditions that regulate the obligations of Supercare as an independent cleaning contractor at the Mall.

[11] In the said letter Supercare requested Broll to sign the MSA and Transaction Schedule and to return same to Supercare. It further invited Broll to contact Supercare should the latter wish to discuss any of the issues contained therein. Broll never signed the MSA and the Transaction Schedule. It is common cause that Supercare commenced cleaning services at the Mall without a signed MSA and Transaction Schedule. In the result, Supercare contended, that the deeming provision therein came into immediate effect and as such thereafter the terms of the MSA regulated the relationship between the parties, *apropos* provision of cleaning services at the Mall.

[12] In relevant part, the MSA⁴ expressly stated that Supercare's cleaning services would not include detection of spillages and/or continuous monitoring of the premises for spillages. According to Supercare, this meant the MSA explicitly excluded Supercare's responsibility for detecting spillages or continuously monitoring the premises. Supercare contended that its role was limited to the provision of cleaning services at the Mall and addressing spillages only when notified by Broll or its employees. Absent the existence of that legal duty, Supercare denied wrongfulness and negligence and thus liability. In the alternative, Supercare pleaded contributory negligence on the part of the appellant and prayed for apportionment of the appellant's proven damages, if any, in accordance with the provisions of s1 of the Apportionment of Damage Act 34 of 1996.

[13] On 10 August 2021, the appellant withdrew its case against Broll.

Evidence of CCTV footage

[14] The Mall has Closed Circuit Television Cameras (CCTV) which continuously monitor the Mall corridors. The incident in *casu* was recorded by the CCTV. The footage showed that the chip fell just 15 seconds before the appellant slipped, and Supercare cleaners responded promptly thereafter.

Findings of the Court *a quo*

⁴ "Appendix 3: Service Levels" of the MSA.

[15] The court *a quo* found that pending the conclusion and signature of the Master Service Level Agreement between the parties, the MSA served as a transitional arrangement and regulated their relationship *apropos* the provision of cleaning services at the Mall. This responsibility was explicitly excluded under the terms of the MSA⁵. That being so, it concluded that Supercare did not have a legal duty to detect or monitor spillages in the mall.

[16] The Court *a quo* further reasoned that in the circumstances, Supercare could not be held liable for failing to perform a duty it was not contractually obligated to undertake. The Court further found that Supercare cleaners responded reasonably promptly after the incident and could not have detected or cleaned the chip in the short timeframe before the fall. It therefore found that Supercare was not negligent.

[17] The court found on the Master Service Agreement, that the responsibility for monitoring and addressing spillages lay with Broll, not Supercare.

Grounds of appeal

[18] The appellant has advanced various grounds of appeal. The crux of this appeal turns on whether the MSA was the binding agreement between Broll and Supercare. If I so found, that will be dispositive of this appeal.

[19] I now turn to deal with the issues for determination on this appeal.

Issues for Determination in this Appeal

[20] Having summarised the factual background, the evidence, submissions, decision of the court below and its reasons, the issues for determination in this appeal have crystallised to be:

⁵ fn2 supra.

- a. Was the MSA binding between Broll and Supercare?
- b. Did Supercare owe a legal duty to the appellant?

The applicable law

[21] In *Probst v Pick n Pay Retailers (Pty) Ltd*⁶, the court held:

'...that it is the owner of the entity in control of a shopping Mall that has the legal duty to take reasonable steps to ensure that a Mall is reasonably safe for its patrons and such a person or entity could be held liable where steps are not taken to ensure the safety of its patrons. The Court further held that, although the owners or management of a Mall may obtain the services of a cleaning company the former still remains liable for any negligent failure on the part of the cleaning company to perform its duties with due care and in the event of a failure of its cleaning system. The ultimate responsibility accordingly lies with the owner or the managing agent and liability for harm can only be avoided if the appointment of an independent contractor is done in a manner where it would be reasonable and not offend public policy to hold the latter liable in the place of the owner/manager. If the appointment was unreasonable i.e. inadequate, then the owner/manager is properly considered to be liable.'

[22] In *Langley Fox Building Partnership (Pty) Ltd v De Valence*⁷ the Court acknowledged the general rule of no liability of a principal for the civil wrongs of an independent contractor except where the principal was personally at fault. The Court further held that the duty on the keeper of the supermarket to take reasonable steps is not so onerous as to require that every spillage must be discovered and cleaned up as soon as it occurs. Nevertheless, it does require a system which will ensure that spillages are not allowed to create potential hazards for any material length of time, and that they will be discovered, and the floor made safe, with reasonable promptitude.⁸

[23] In *Langley* the test for negligence in a case such as this, consonant with the classic test for culpa laid down in *Kruger v Coetzee*,⁹ was set out as follows:

⁶ 1998 (2) All SA 186 (W).

⁷ *Langley Fox Building Partnership (Pty) Ltd v De Valence* 1991 (1) SA 1 (A) ("Langley").

⁸ Fn8 above.

⁹ Holmes JA formulated the test for negligence *Kruger and Coetzee* 1966 (2) SA 428 at 430E – G as follows:

- '(a) would a reasonable man have foreseen the risk of danger in consequence of the work he employed the contractor to perform? If so,*
- (b) would a reasonable man have taken steps to guard against the danger? If so,*
- (c) were such steps duly taken in the case in question?'*

[24] In determining the answer to the second enquiry into negligence, Ponnar JA¹⁰ again referred to *Langley* where Goldstone AJA held that it was foreseeable to a reasonable person in the position of Langley Fox that the workmen erecting the ceiling would require some form of construction to raise it above the level of the sidewalk, as an obstruction of such a nature would necessarily constitute a source of serious potential danger to pedestrians using the sidewalk. Accordingly, '[T]o place it there, and no more, was an inherently dangerous act.'¹¹

[25] In *Chartaprops*¹², Ponnar JA further held:

"It is not easy to see why an exception should be specifically carved out allowing a person injured to recover from a principal in addition to the normal rights that the person enjoys against the independent contractor posited as the effective cause of the wrong. In particular, it is difficult to see why the general policy of the law that the economic cost of the wrong should be borne by the legal entity immediately responsible for it, should not be enforced in this case. Furthermore, to shift the economic cost of negligent acts and omissions from Advanced Cleaning, the independent contractor with primary responsibility, to Chartaprops, because of the legal fiction of non-delegability, appears to me to be undesirable. There are few operations entrusted to an independent contractor by a principal that are not capable, if due precautions are not observed, of being sources of danger to others. If a principal were to be held liable for that reason alone the distinction between 'employee' and 'independent contractor' will all but disappear from our law...., Neither the terms of Advanced Cleaning's engagement, nor the terms of its contract with Chartaprops, can operate to discharge it from a legal duty to persons who are strangers to those contracts. Nor can they directly determine what it must do to satisfy its duty to such persons. That duty is cast upon it by law, not because it made a contract, but

"a reasonable person in the position of the defendant would have foreseen the reasonable possibility of harm and would have taken reasonable steps to prevent it happening, and the person in question did not do so, negligence is established."

¹⁰ Chartaprops at para 43.

¹¹ Langley at 121.

¹² Chartaprops at paras 43 to 46.

because it entered upon the work. Nevertheless, its contract with the building owner is not an irrelevant circumstance, for it determines the task entered upon."

[My underlining]

[26] In respect of negligent omissions our courts stated the following in *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd*¹³:

*"In these instances, it is said, wrongfulness depends on the existence of a legal duty not to act negligently. The imposition of such a legal duty is a matter for judicial determination involving criteria of public or legal policy **C** consistent with constitutional norms."*

Application of law to the facts and analysis

Is MSA the binding agreement between the parties?

[27] It is common cause that on 2 June 2015, Supercare submitted to Broll a written "proposal to provide cleaning services at the Mall ("the proposal") via email under a covering letter ("the covering letter"). The proposal was subject to certain conditions which were stipulated in the covering letter. In relevant parts the covering letter reads: *'in the event that Supercare's proposal is accepted, the terms and conditions of any agreement or contract to be entered into between the parties shall be negotiated and agreed between them.*

No contract shall come into effect between the parties until and unless a written agreement is concluded by the parties pursuant to the finalisation or negotiations taking place.'

[28] Broll clearly accepted the proposal together with conditions attached to it on 8 June 2015. Since no written agreement was concluded thereafter, Supercare sent Broll a copy of the Master Service Agreement (MSA) and Transaction Schedule under cover of a letter 8 July 2015. The aforementioned letter contained deeming provisions to the effect that *should the cleaning services commence before the MSA and Transaction Schedule is signed all the terms and conditions of the accepted cleaning proposal (as amplified by the terms of the MSA and the Transaction Schedule) will be deemed to be binding on both parties.* Broll did not reply to this letter and did not disagree with proposed deeming provisions.

¹³ 2006 (3) SA 138 (SCA) at par 10.

[29] Supercare commenced with the provision of cleaning services at the Mall on 1 July 2015, as a result the deeming provisions came into effect. Broll also paid their agreed monthly fee of R61,900 without fail from 31 July 2015 until 25 February 2018. Notwithstanding the wording of the second paragraph of the deeming provisions it cannot be gainsaid that the first and second defendant concluded the binding provisional agreement. In *McWilliams v First Consolidated Holdings (Pty) Ltd*¹⁴, the Appellate Division (now the SCA) said:

'... and that a party's failure to reply to a letter asserting the existence of an obligation owed by such party to the writer does not always justify an inference that the assertion was accepted as the truth. But in general, when according to ordinary commercial practice and human expectation, firm reputation of such an assertion will be the norm if it was not accepted as correct, such silence and inaction, unless satisfactorily explained, may be taken to constitute an admission by him of the truth of the assertion....'

[30] Broll did not dispute receipt of the covering letter of 18 July 2015 and the attached MSA and Transaction Schedule. Prior to the commencement of the cleaning services by Supercare, Broll had an opportunity to reject the deeming provisions. It simply elected not to do so. In the result the deeming provisions came into effect and bound the parties. The deeming provisions are incorporated in the MSA, and they expressly excluded Supercare's responsibility for detection of spillages and continuous monitoring thereof¹⁵. Accordingly, Broll's silence or inaction amounted to quiescence and constitutes an admission by Broll of the truth of assertion that the MSA excluded detection spillages by Supercare. Consequently, the MSA was binding and excluded any duty on Supercare to detect spillages.

Considerations of public and legal policy

[31] Broll was the responsible agent appointed by Investec to manage the Mall and to detect spillages. As a result of that appointment the Mall's safety duty lay primarily with Broll, not Supercare. This duty cast on Broll by law and public policy to take steps

¹⁴ *McWilliams v first Consolidated Holdings (Pty) Ltd* 1982 (2) 1 (A) 10E-H ("McWilliams").

¹⁵ The relevant part of MSA is to be found at "Appendix 3: Service Levels", which provides that the services shall not include detection of spillages and continuous monitoring of Premises for spillages.

to guard against harm is one that is capable of being discharged only if the steps that are required to guard against the harm are taken. This duty has been expressed on another occasion as “a duty not merely to take care, but a duty to provide that care is taken “so that if care is not taken the duty is breached”.¹⁶ Whether such precautions were to be taken by Broll or Supercare **is a matter depending on their contract.**

[32] In *Minister of Safety and Security v Van Duivenboden*¹⁷, the following principle was stated:

‘[12] Negligence, as it is understood in our law, is not inherently unlawful - it is unlawful, and thus actionable, only if it occurs in circumstances that the law recognises as making it unlawful. [11] Where the negligence manifests itself in a positive act that causes physical harm it is presumed to be unlawful, but that is not so in the case of a negligent omission. A negligent omission is unlawful only if it occurs in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm.’

[33] In *casu* by contracting Supercare out of the work to detect spillages and continuous monitoring of the Mall, Broll retained that duty. In the circumstances, it would be against public policy to hold Supercare negligent and thus liable.

[34] Even if Broll may have been negligent, the appellant withdrew her claim against Broll. We therefore do not make any finding in this regard because this issue was not before the Court *a quo* and is certainly not before us.

Analysis of video evidence on appeal

[35] The video evidence was part of the record which the appeal court had to consider. Furthermore, the court was invited to view the footage by the parties. The video footage in my analysis shows a probable time of the chip falling and the appellant slipping on it 15 seconds later. A Supercare cleaner responded promptly, arriving within 10 seconds after the fall to clean the chip and the surrounding area. It was determined that Supercare acted reasonably and could not have responded faster. Legal wrongfulness of an omission requires a duty to act positively to prevent harm,

¹⁶ Clerk and Lindsell on Torts 19 ed para 6-53, citing Langton J in *The Pass of Ballater* [1942] p 112 at 117.

¹⁷ 2002 (6) SA 431 (SCA).

which is assessed based on factors like foreseeability, statutory obligations, and control over the situation. Not all accidents imply fault or liability, and in this case, a reasonable defendant in Supercare's position would not have acted differently. In my view, given the 15-second window, no reasonable cleaning system could respond faster; thus, even if it had a legal duty, negligence cannot be inferred.

Conclusion

[36] To conclude, failure to prove a legal duty is dispositive; *"from nothing, nothing comes"* (*ex nihilo nihil fit*).

[37] For the reasons set out above, I do not find there was any misdirection by the court *a quo* which warrants interference. Accordingly, I would propose dismissing the appeal with costs.

P NJOKWENI

Acting Judge of the High Court

I agree



G DA SILVA-SALIE

Judge of the High Court

I agree



H SLINGERS
Judge of the High Court

Appearances

For Appellant: Adv Patrick MacKenzie
Instructed by: Jonathan Cohen & Associates

For Respondent: Adv Jurgen J Rysbergen
Instructed by: MacGregor Erasmus Attorneys