IN THE HIGH COURT OF SOUTH AFRICA

(EAST LONDON CIRCUIT LOCAL DIVISION)

Case No.: EL1830/2011
ECD3564/11
Date heard: 31 October 2012
to 2 November 2012
Date delivered: 22 January 2013

In the matter between:

MARGARET LOUISE ASCANI Plaintiff

and

VINCENT FAMILY PHARMACY CC Defendant

J U D G M E N T

DAMBUZA, J:

[1] This is a claim for damages arising from injuries sustained by the plaintiff as a result of falling whilst at defendant's premises, a pharmacy, located within the Vincent Shopping Mall in East London. At this stage the matter is before me for determination of the merits only.

[2] It is not in dispute that on 17 May 2011, whilst at the Vincent Family Pharmacy, a business conducted from Shop 12, Vincent Park Shopping Mall, Vincent, East London (the premises or the pharmacy) the plaintiff fell, shortly after she had entered the premises. In the Summons the plaintiff alleges that she slipped on a wet floor surface, resulting in the fall and consequent injuries. It is the cause of the fall that is in dispute in these proceedings. In the plea the defendant admits that

the plaintiff fell whilst walking in the premises. The defendant, however, denies that the floor on which the plaintiff fell was wet and that she fell as a result thereof. The exact spot in the premises whereon the plaintiff fell is also in dispute. It is common cause that the shelves on which items on sale at the pharmacy are kept are arranged in parallel rows, on the floor, with passages or aisles in between. According to the plaintiff, she fell whilst walking along the third aisle, whilst the defendant contends that the plaintiff was walking down the second aisle when she fell to the floor.

[3] Two witnesses gave evidence on behalf of the plaintiff; it was the plaintiff herself and her partner (husband) Stanley Theunis Joseph Van Zyl. Two witnesses gave evidence on behalf of the defendant. They were both employed by the defendant and were present at the premises when the plaintiff fell.

[4] The plaintiff's evidence was that at about 9:15 in the morning on the day in question she entered the defendant's premises and walked to the centre aisle (the third aisle). She was going to the prescription counter which was located at the back of the premises. When she was about two steps into the aisle, her right heel slipped and she was propelled forward and landed heavily on her right hand side on the floor. As she lay on the floor she could feel with her hand that the floor was *"damp"*. A staff member came to her and, whilst trying to assist her, uttered the words *"oh dear they have just washed the floors".* There was also another member of staff who came to her assistance, offering her a pillow under her head. The ambulance was called and the plaintiff was taken to hospital. The plaintiff's partner was also called. The plaintiff was wearing low heeled boots which were tendered in evidence

as exhibit “1”. The heel of each shoe is 5.1cm high and the surface thereof is 6cm². Both the heel and the sole of the shoes are covered in a serrated *“rubber-like”* substance.

[5] Stanley Theunis Joseph Van Zyl, the plaintiff’s partner, testified that he was, indeed, called to the pharmacy where the plaintiff had fallen. He went there in the company of his daughter who had just arrived for holidays from Johannesburg. On his arrival the paramedics were already on the premises and were *“busy with”* the plaintiff. The plaintiff was in *“the middle aisle”*, about one third of the way down.

[6] Natasha Smith was the first witness to give evidence on behalf of the defendant. She had been working at the pharmacy for almost three years at the time of the plaintiff’s fall. On the day in question she became aware of the fall whilst standing near a stand whereon food supplements on sale are placed, some distance from where the plaintiff fell. Having heard the noise, Smith proceeded to where the plaintiff was lying on the floor and was the first person to reach her. According to her, this was in the second aisle in the pharmacy. (It is common cause that at the time there were five aisles in the pharmacy). According to Smith, although the floor had been washed or *“mopped”* about an hour before the plaintiff fell thereon, it was *“completely dry”* when she fell. Smith however decided to feel it with her hand to assess if it was not wet. Whilst she was with the plaintiff, the plaintiff told her that her husband would *“kill her”* as she had just hurt her back when she fell a few days before. The plaintiff also said that it was *“not the fault of the pharmacy”* that she had fallen; she (the plaintiff) had not been looking where she was going. Smith continued sitting next to the plaintiff on the floor, comforting her, until the ambulance arrived,

about half and hour to an hour from the time that the plaintiff had fallen. The plaintiff was then taken to hospital.

[7] Smith also gave evidence on the procedure used at the pharmacy when cleaning the floor. Her evidence was that the floor of the pharmacy would be cleaned every morning. The procedure used by staff members in cleaning the floor was the same. Whoever would be cleaning the floor would start from the front; that being the main entrance to the pharmacy. They would then proceed to the first aisle, to the second until they finished the five aisles in the pharmacy. They would then proceed to the area where food supplements were kept, and thereafter to the dispensary. Whilst cleaning the floor, a warning sign would be placed on the floor of the aisle which was being cleaned and would not be removed *"until the floor was dry".* The floor would be cleaned with plain water using a *"mop"*.

[8] On the morning of the plaintiff's fall the floor had been cleaned by Heidi, another employee at the pharmacy at the time. Ordinarily it took one to one and a half hours to clean the floor. When the plaintiff fell Heidi was at *"the back"* of the premises, throwing away the water after cleaning the floor. Smith confirmed that indeed the *"wet floor"* warning sign was not anywhere on the floor of the pharmacy when the plaintiff fell; it had been removed as the floor was dry. According to Smith, the plaintiff never suggested to her that she fell because the floor was either wet or damp.

[9] Joan Roy was the second witness to testify on behalf of the defendant. She had been working at the pharmacy for 15 years at the time of the plaintiff's fall. Her

evidence was that when she arrived at work, at about 8:20 on the morning in question Heidi was cleaning the floor in the third aisle of the pharmacy. Roy then went to stand at the front of the shop between the second and third aisle and assisted customers. She had been standing there for a while when she heard a sound as the plaintiff fell to the floor. She rushed to the spot where the plaintiff had fallen and when she arrived there, Smith was already with the plaintiff. On reaching the plaintiff Roy bent down on her knees, with one hand on the floor as she wanted to assist in lifting the plaintiff up, but the plaintiff told them to leave her where she was. Whilst her hand touched the floor, she noted that the floor was dry. She heard the plaintiff tell Smith that her (plaintiff's) husband would kill her because *"she had just been to the doctor two days before"*.

[10] That is the evidence on which I have to decide whether the defendant is liable for the plaintiff's fall.

[11] Firstly, on the issue of whether in this case the floor was wet when the plaintiff fell, and if so, whether that was the cause of the plaintiff's fall, the plaintiff testified firmly that it was. In my view her evidence has a ring of truth in it. As I have stated according to the plaintiff, the first remark made by Smith, was that *"they (have) just washed the floor*". The fact that the floor had indeed been washed prior to the plaintiff's arrival lends credence to the plaintiff's evidence. I can find no evidence that the plaintiff could have known that the floor had been washed prior to her arrival at the pharmacy. Her evidence that she felt the floor is consistent with what a reasonable person would have done on hearing that the floor had been washed prior to her fall.

[12] I accept that the plaintiff was hesitant in responding to some questions during cross-examination and that at times her responses were not clear; but I did not gain the impression that hesitation on her part was caused by *"fabricating"* responses to questions asked of her. It rather seemed to me that she hesitated because she either did not understand the questions or was trying to recall how exactly the incident unfolded. For example, she was asked whether her foot slipped to the right or left when she fell. She was hesitant in responding and ultimately said: *"...no straightforward... to the right".* She was also asked if she had a back *"condition"* at the time of her fall. Her response was: *"not that I am aware of"*, and thereafter she referred to an ankle injury which she had sustained in June 2010. It was put to her, during cross-examination, that she was prone to falling and injuring herself, but she was able to explain how satisfactorily, in my view, she sustained the ankle injury referred to and how the injury was exacerbated by her assisting an elderly woman up the stairs in a block of flats. In this regard *Mr Dugmore* who appeared on behalf of the defendant, agreed that the plaintiff's evidence in this regard accorded with records in his possession regarding physiotherapy treatment administered on the plaintiff. The plaintiff's response and demeanour when it was put to her that the defendant's witnesses would testify that the floor was dry was spontaneous and had a ring of honest disbelief. She responded thus: *"... the girl was sitting there, how can she say it was not wet?".* On the whole the plaintiff impressed me as an honest and reliable witness.

[13] On the other hand Smith unsuccessfully attempted to distance herself from the comment attributed to her, that she told the plaintiff that *"they"* had just washed the floor. She could not explain, however, why she found it necessary to feel with

her hand whether the floor was dry, when her evidence was that so much time had lapsed since the floor was washed that it could not have been wet. Her evidence was self contradictory in that she testified that the floor had been *"washed"* an hour prior to the plaintiff's fall and therefore *"it was not necessary to check whether it was wet"*; yet it was her evidence that she felt with her hand whether the floor was wet. Her explanation during cross-examination for examination of the floor, that it had been raining on that day and, on occasion, drops of water from clothes of customers had caused the floor of the pharmacy to be wet was, in my view, an afterthought. (Emphasis added.)

[14] Further Smith's evidence was that the plaintiff told her that a few days before she had fallen and *"hurt her back"* was not consistent with what had been put to the plaintiff. All that was asked of the plaintiff was whether she had a *"back condition"*. Equally it was not put to the plaintiff that she had told Smith she had not been looking where she was going. In my view Smith was a particularly poor witness. Apart from the fact that her evidence generally did not accord with the probabilities, she contradicted herself, avoided responding to some questions and, at times sought to retract some of her evidence. I am not persuaded by her explanation that discrepancies in her responses were caused by lack of sleep on the night preceding the first day of evidence. I am also not persuaded by the submission by *Mr Dugmore* that what appeared as reluctance to respond to questions on the part of Smith was caused by inability to understand the questions that were put to her. The questions were simple, in my view.

[15] Roy's evidence did not add much value to the defendant's case. She persisted in her evidence that every inch of the floor was dry when the plaintiff fell because the floor would take 3 to 5 seconds to dry. It is improbable that this estimate of time was true for all instances of the cleaning of the floor of the pharmacy. Her evidence that the plaintiff told Smith that she had been to the doctor a few days before is not consistent with Smith's evidence that the plaintiff had said she had hurt her back.

[16] In their evidence, both Smith and Roy were eager to refer to the shoes worn by the plaintiff as a probable cause of the fall. Yet there is no evidence that either of them suggested to the plaintiff, on the day in question, that the fall was or might have been caused by the shoes she was wearing. Roy's evidence in this regard was that she saw the plaintiff shoes on that morning and, because she owned the same or similar pair of shoes and had fallen whilst wearing them, she had thought that they were probably the cause of the fall. Yet she did not share this explanation with the plaintiff when conversing with her.

[17] Of more significance is the evidence given by both Smith and Roy on the procedure used when washing the floor. Apart from the sequence followed by each one of them when washing the floor, starting from the (front) entrance, and thereafter to each of the aisles, to the supplements area and thereafter to the dispensary, there does not appear to have been a standard or established method of cleaning the floor. On the evidence before me the method used by each one of them, is different from the other. Furthermore, I agree with the submission by *Mr Louw* who appeared on behalf of the plaintiff, that their practice of removing the warning sign from aisle to

aisle as they proceeded with the cleaning, was not an adequate warning to customers of possible danger from the recently washed floor. Perhaps the method of moving the warning sign from aisle to aisle might be more suited to bigger premises such as supermarkets with long passages. I also agree that a more appropriate method would have been to leave the warning sign near the door where everyone would probably see it as they entered the pharmacy until the floor was completely dry, or even to put more than one warning sign.

[18] Of significance is Roy's evidence that she would, prior to removing the warning sign from each aisle, first wave a cardboard over the area which had been washed, to ensure that it dried up, a step which did not feature in Smith's evidence. It seems to me that this extra measure would have been taken in recognition of the fact that the floor could not be completely dry from wiping with the same mop that had been used in washing the floor. This confirms my view that the 3 to 5 seconds estimated by Smith and Roy as the time for the floor to dry completely cannot be accurate for every instance of washing. Of additional significance is Roy's evidence that at some stage subsequent to the plaintiff's accident, the method of cleaning the floor at the pharmacy was changed to using an additional dry mop to ensure that the floor is wiped dry.

[19] In the context of the different methods that the pharmacy staff used when washing the floor the fact that the person who cleaned the floor on that morning did not give evidence becomes significant. In my view, Heidi's evidence would have been more appropriate for a proper assessment of the condition of the floor at the time of the plaintiff's fall.

[20] In *Kruger v Coetzee*[1] Holmes JA held that:

> "For the purposes of liability *culpa* arises if-
> (a) A *diligens paterfamilias* in the position of the defendant-
> (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
> (ii) would take reasonable steps to guard against such occurrences; and
> (b) the defendant failed to take such steps.
> This has been constantly stated by this Court for some 50 years. Requirement (a)(ii) is sometimes overlooked. Whether a *diligens paterfamilias* in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case. No hard and fast basis can be laid down. Hence the futility, in general, of seeking guidance from the facts and results of other cases."

[21] I am satisfied that the defendant should have foreseen that the washing of the floor could result in an injury to customers that came into the pharmacy. The defendant could have taken reasonable and necessary precautionary steps to warn members of the public of possible danger resulting from the washing of the floor. Such measures would be placing the warning sign near the entrance where customers could easily see it and not remove the sign until the floor was dry. The floor could also have been washed at the end of the previous business day. The defendant failed to take these steps and precautions.

[22] At the end of the plaintiff's case an application for absolution from the instance was brought on behalf of the defendant. The basis for the application was that no evidence had been led to the effect that the condition of the floor was as pleaded in

[1] 1966 (2) SA 428 (AD) at 430 E-G.

the summons. The plaintiff pleaded, in the summons, that she slipped *"on the wet floor surface"*. As I have stated, her evidence was that as she lay on the floor she could feel with her hand that the floor was *"damp"*. The submission on behalf of the defendant was that the plaintiff had not led any evidence to prove that the floor was wet and/or *"sufficiently wet"* so as to cause a fall. I dismissed the application. The distinction between *"wet"* and *"damp"*, in my view, could not sustain a submission that no court could reasonably find for the plaintiff.[2] *"Dampness"* is only a degree of *"wetness"*. In the Shorter Oxford English Dictionary[3] the word *"damp"* is defined as *"slightly wet; moist; permeated with moisture"*.

[23] The submission was repeated during argument after all the evidence had been led. *Mr Dugmore* pointed out that the usual pleading in summons is that the floor was *"wet and slippery"* and submitted that, to succeed in her claim, the plaintiff had to prove that the floor was wet and sufficiently wet to cause a fall. In this regard the defendant relied on *Camilleri v Old Mutual Investment Group Investments (Pty) Ltd*[4] in which Cloete AJ cited, with approval, amongst others the following passage in *Gilson v Shoprite Checkers:*[5]

> "[20] .... At the risk of stating the obvious, it must be remembered that the issue as to whether or not there were adequate cleaning facilities in place on the day in question will only arise if the plaintiff has been able to establish, on a balance of probabilities,

[2] See Rule 39(6) of the Rules of Practice in the Superior Courts.

[3] 5th Edition.

[4] An unreported judgment of the Western Cape High Court, Case No. 16484/2007; delivered on 13 November 2011.

[5] An unreported judgment of the Western Cape High Court, Case No. A69/2008; delivered on 25 August 2008.

that **sufficient** quantities of dust had accumulated on the floor to cause it to be slippery and that the defendant ought to have been aware of this ...."

[24] I do not think that one requires expert evidence to establish the difference in the properties of dust and liquid and the obvious consequences therefrom. The comparison is misplaced in my view. Dust is ordinarily expected to be present on uncovered surfaces including floors; such presence of dust is not necessarily hazardous or will not ordinarily cause a fall. Hence one would need to prove that the extent to which dust had accumulated on a particular surface was such as would not ordinarily be expected on that (particular) surface or in particular circumstances. The same cannot be said of a wet floor, especially in a pharmacy where, in my view, one would ordinarily least expect a wet floor because of the nature of business conducted there. One obviously expects a higher incidence of vulnerable persons in a pharmacy than, for example, in a supermarket; and therefore the extent of duty of care on the owner of a pharmacy would commensurate.

[25] In the result my order is that:

1. The defendant is held liable for such damages as the plaintiff will prove to have suffered as a result of an injury sustained by her when she fell at the defendant's pharmacy on 17 May 2011;

2. The defendants shall pay the plaintiff's costs of suit.

_____

N DAMBUZA
JUDGE OF THE HIGH COURT

Appearances

For plaintiff:

Adv S.S.W. Louw

Instructed by Niehaus McMahon Attorneys, East London

For defendant:

Adv A.G. Dugmore

Instructed by Bate Chubb & Dickson Inc, East London