IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GRAHAMSTOWN)

CASE NO.: 1499/08

In the matter between:

ISABEL DOROTHY MAHOMED **Plaintiff**

and

PEP KOR LIMITED **Defendant**

JUDGMENT

GROGAN, A.J.:

[1] On 2 September 2006, the plaintiff, a 68-year-old woman, paid a visit to Pep Stores in McLean Street, King William's Town to do some shopping. While she was walking up an aisle in the store towards the cashiers to pay for the single purchase she had made — a packet containing a set of kitchen curtains — she fell to the floor. The plaintiff claims that she fell forward because her foot struck a projection caused by an unevenly laid tile, and that as a result of

the fall she sustained injuries to her left wrist that have caused her pain and inconvenience, and which will require medical treatment, including surgery, to correct the effects of the injury. She accordingly sues the defendant for R251 600.00 for estimated future medical expenses and general damages. The defendant denies liability for the plaintiff's fall and its sequelia.

[2] The general test applied in delictual claims is that set out in the oft-cited judgment of *Kruger v Coetzee* 1962 (2) SA 428 (A) at 430E, namely:

> "For purposes of liability *culpa* arises if—
>
> 1. A *diligens paterfamilias* in the position of the defendant—
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> (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and cause him patrimonial loss; and
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> (ii) would take reasonable steps to guard against such occurrence; and
>
> 2. the defendant failed to take such steps."

[3] In addition, those cases which involve claims against defendants operating shops where accidents occur in circumstances such as the present are relevant. The latest of these is *Charterprops (Pty) Ltd & another v Silberman* 2009 (1) SA 265 (SCA). As was correctly observed by Willis J in the unreported case of *Both v Post Office Cafe Bazaar CC* (39502/08) [2009] ZAGPJHC (11) November 2009 at para. 23), the *Charterprops* judgment

confirms that the trend of such cases is that "it is strongly suggestive of negligence and unlawfulness if supermarkets allow obstacles to be on the floor, which should not be there and which cause persons to have accidents". This does not equate to strict liability or require the automatic application of the doctrine of *res ipsa loquitur*: *Monteoli v Woolworths (Pty) Ltd* 2000 (4) SA 735 (WLD).

[4] The present case accordingly turns in the first instance on whether there was an obstacle on the floor of the defendant's McLean Street store sufficient to trip the plaintiff and, if so, on whether that obstacle was the cause of the plaintiff's fall.

[5] I turn first to the evidence relating to the alleged obstacle. The plaintiff's claim that there was a raised tile on the floor of the aisle along which she had walked was supported by her own evidence and by the testimony of two witnesses called by herself. The plaintiff testified that after selecting her purchase she proceeded towards the cashiers with the packet in her right hand and her handbag over her left shoulder. She was wearing flat shoes at the time. The plaintiff said that she "kicked against something" and fell forward, attempting to break her fall with her left hand. When she had assumed a sitting position, her hand was very painful and had turned blue. She nevertheless felt the floor to establish what had caused her to trip, and "felt that the tiles were uneven". Under cross-examination, the plaintiff was asked to elaborate on that description. She said then she estimated that the

difference between the surfaces of the tiles formed a step of about 2 centimetres. When that measurement was demonstrated to her, the plaintiff revised her estimate to slightly less than 1 cm.

[6] Ms Angela Danston, who was in the shop at the time, testified that the plaintiff fell as she (the plaintiff) passed her. Ms Danston said that as the plaintiff was being assisted by the store's staff, she (Ms Danston) looked down at the spot where the plaintiff had fallen and noticed "that there was a tile that was not level". This was confirmed when she "felt" the spot. When Ms Danston was asked to depict the difference of the surfaces of the adjacent tiles by drawing parallel lines on a piece of paper, the lines were about 1mm apart.

[7] The third witness who testified on this issue for the plaintiff was Mr Cecil Pennels, whom the plaintiff described as her "boyfriend". Mr Pennels said he was waiting for the plaintiff in his car outside the store when he was called by one of the shop assistants. When he arrived at the scene, he found the plaintiff sitting on a chair which had been placed there for her by a member of staff. The plaintiff was in tears. After the plaintiff told him that she had fallen, Mr Pennels looked down and observed an "angled" tile which, in his estimation, was projecting about 2 to 3 mm above the surface of the others. Mr Pennels said he could see as well as feel the projection.

[8] Both the defendant's witnesses said the floor was even. The then store manager, Mrs Tandezwa Mgudulwa, was not present at the time the plaintiff fell. When Mrs Mgudulwa arrived at the scene a few moments later, the plaintiff was already sitting in the chair. Mrs Mgudulwa said the plaintiff had told her that "she had made a mistake". She confirmed that Mr Pennels had been called. According to Mrs Mgudulwa, Mr Pennels asked her what had happened and, before she was able to reply, said in a loud voice that he was not prepared to talk to a "black woman", at which the plaintiff repeated that she had fallen "by mistake". Mrs Mgudulwa said she gave Mr Pennels the name of the area manager, stationed in East London. She said she had not noticed any obstacle on the floor, which appeared to her "quite normal".

[9] The said area manager, Mr Lester Petzer, said the plaintiff had called at his East London office a day or two after the incident. He reported the matter to the defendant's claims department and inspected the floor a few days later. Mr Petzer said he noticed no abnormalities in the tiling of the aisle at the spot where the incident had occurred, or elsewhere. Mr Petzer added that after the store opened in May 2006, when the flooring was laid in accordance with company specifications, he had inspected the work and approved the tiling. Before and after 2 September 2006, nobody other than the plaintiff had fallen in the store.

[10] In addition to this oral testimony, both the plaintiff and the defendant handed up photographs of the scene. On the most careful scrutiny, neither set of

photographs shows any visible imperfection other than a very slight "V-shaped" indentation in the tiling at or in the vicinity of the spot where the plaintiff indicated she had fallen. However, it is impossible to conclude with confidence from an examination of the pictures whether there were or were not slight variations in the tile surfaces. All that can be said is that they depict what for all intents and purposes is a professionally laid tiled floor.

[11] Such, then, is the evidence on which this Court must decide on the probabilities whether there was indeed an obstacle which tripped the plaintiff and caused her to fall. It is surprising that neither party resorted to the obvious expedient of testing the level of the tiles with a straight-edge, which is the only sure manner in which differences in the surface levels of tiles can be detected, and their magnitude gauged. As it is, all the Court has to go on are varying estimates by persons who had used their fingers or the naked eye.

[12] It appears common cause that the plaintiff's estimate must be rejected out of hand; had there been a difference in tile surfaces of anything like 1 cm (still less 2 cm) it would be immediately apparent from the photographs. Leaving aside their credibility as witnesses, the estimates of both Ms Danston and Mr Pennels are also far from persuasive. While their estimates of the slight variation between the tiles may serve as an indication of candour, the minute variations they claim to have observed or felt also renders their estimates suspect. A one- to two-millimetre variation between the surfaces of tiles is not readily perceived by the naked eye. To feel such a variation with the fingers is

also difficult because of the indented channels of grouting between the tiles. It is also not inconceivable that both Ms Danston and Mr Pennels were driven to reduce the size of the alleged projection by the fact that anything larger would be plainly inconsistent with the photographic evidence.

[13] I interpose to mention one aspect of this case that may explain why the two witnesses for the plaintiff who testified after her reduced their estimates of the alleged projection relative to the plaintiff's version as significantly as they did. After the defendant indicated that it had closed its case, Mr *Wood*, who appeared for the plaintiff, applied to reopen her case. For reasons given *ex tempore* during the hearing, the Court refused that application. During discussion, reference was made to a report by one G A B Robins, apparently an assessor commissioned by the defendant or its insurer. Mr *Wood* sought to reopen the plaintiff's case to call the said Robins, whom he said he had thought would be called by the defendant. When I asked for a copy of the report to assist me to decide the interlocutory application, Mr *De la Harpe* did not object to its being handed up, although he contended that the report was privileged. In response to the Court's request for an indication of which aspect of the report he intended to explore with Robins, Mr *Wood* drew my attention to a passage which read:

> "We found the floor tiles of the store to be in a generally sound condition, but cannot rule out the possibility that a few tiles may be standing proud by 1 or 2 mm of the surrounding tiles and that the Third Party may well have tripped as a result of the tiles standing proud."

[14] Mr *Wood* properly disclosed that he had not consulted the author of this report, and equally properly that his examination of Robins would therefore have been in the nature of a fishing expedition. I mention the report in this context because it seems probable that Ms Danston and Mr Pennels were aware of its contents, and sought to align their evidence to the "concession" that might have been confirmed by Robins had he testified.

[15] I declined the plaintiff's application to reopen her case because in my view Robins' evidence would have taken the matter no further. On the evidence before me, I am prepared to accept that the surfaces of one or more of the tiles depicted in the photographs varied by between one and two millimetres from the surfaces of the others.

[16] But that is not the end of the inquiry. The next issue is whether such variation was on the probabilities the cause of the plaintiff's fall. At best for the plaintiff, she is favoured by ordinary human experience — people do not generally fall headlong in supermarkets unless they are unexpectedly tripped by some obstacle. However, as with most propositions based on human experience, that is merely a generalisation; people may fall for reasons unconnected with unseen obstacles on the surface where they are walking.

[17] In this respect, there are also problems with the plaintiff's evidence. One is the variance between her own testimony and that of her witnesses on the position, let alone the dimensions, of the alleged projection. According to the plaintiff, she tripped near the middle of the aisle. Mr Pennels appears to have observed the tiles to the side of it, and Ms Danston was uncertain where she had seen the ridge of which she spoke.

[18] Another problem is the evidence relating to the shoes the plaintiff claimed to have been wearing on the day of the accident. According to the plaintiff, she was wearing light coloured flat shoes at the time. According to Mrs Mgudulwa, the plaintiff was wearing high-heeled shoes of dark colour, with pointed toes. Mr *De la Harpe*, who appeared for the defendant, contends that in the light of the plaintiff's disingenuous estimate of the height of the obstacle, the rest of her evidence should be rejected. While I hesitate to go that far, the contradiction between the evidence of these two witnesses on this point requires a finding to be made on the basis of credibility. On that point, I have no hesitation in finding that Ms Mgudulwa was the more credible witness. The plaintiff was asked by her attorney to produce the shoes she was wearing only after litigation had commenced. Mrs Mgudulwa, on the other hand, was relying on contemporaneous observation, which, in the circumstances, would in all probability be implanted in her memory. Since she is no longer in the defendant's employ, Ms Mgudulwa had no reason to mislead the Court on this point.

[19] While in one sense the type of shoes worn by the plaintiff at the time of her fall is irrelevant (the defendant has a duty of care towards all its customers, however shod), in another it is not. The plaintiff is a relatively elderly woman, who suffers from angina. She is not of athletic build. The chances of her falling forward increase with the length of her heels. And the duty of the defendant to guard against a fall diminishes proportionally. The type of shoe worn by the plaintiff is also relevant because it introduces a possible cause of her fall apart from the obstacle to which she attributes it. That possibility is strengthened by Mrs Mgudulwa's evidence that the plaintiff had twice stated that she had fallen "by mistake". I accordingly find that the plaintiff has failed to prove that her fall was caused by a projection on the tile surface of between one and two millimetres.

[20] This finding would ordinarily end the inquiry. However, in case I am wrong in that regard, I proceed to the next leg of the test laid down in *Kruger v Coetzee* supra. The plaintiff was required to prove not only that there was an obstacle which caused her to fall, but also that it was of such a nature that the defendant had a duty to guard against the danger posed by that obstacle. In this case, the only action the defendant could have taken was to re-lay the tiles, if indeed there were any irregularities in the floor, or to place a warning in the aisle. The evidence relating to the alleged variation in the tile surfaces is relevant in this regard as well. On the plaintiff's version (disregarding her own evidence) the variation was so slight that it required confirmation by touch. The photographic evidence depicts a normal tiled floor, and to that extent confirms the evidence of the plaintiff's witnesses that they could detect no

imperfection. That being the case, it must be asked, applying the test in *Kruger v Coetzee*, whether a *diligens paterfamilias* in the position of the defendant "would have foreseen the reasonable possibility of his conduct injuring another in his person or property and cause him patrimonial loss", and whether that same *diligence paterfamilias* would have taken steps to guard against such occurrence. In my view, there was nothing to alert the defendant to the possibility that somebody might trip in that part of the store. It cannot accordingly be culpable, or held liable, for failing to take steps that might have prevented the fall. While the facts in *Govender v Salgados Fruiterers t/a Lydhust Fruit Basket* (2009) 1 SA 500 (WLD) are entirely different, the remark with which that judgment concludes (at 508E) applies equally to the present case: "In my view to extend the duty of care in such circumstances would make life in this country unbearable and cast too wide a duty on shop owners and occupiers".

[21] Even if the defendant was aware that there was a minute variation in the levels of the tiles, the further question is what reasonable steps it could or should have taken to guard against the risk thus posed. The common law duty of care does not require extravagant steps. The duty of care requires no more than reasonable steps. The present case did not involve the performance of some inherently dangerous task, or some inherently dangerous situation, against which the defendant was obliged to guard. The projection proved in *Both v Post Office Cafe Bazaar CC* was found to be between 50mm and one cm in height. That constitutes an obstacle the shop owner could be expected to have observed, and to warn against and correct. In this case, the minute

variations that may be found on the surface of a normally tied floor are not in my view such as to create a hazard against which the defendant could reasonably be expected to guard.

[22] For these reasons, I find that the plaintiff has failed to discharge the onus of proving that the defendant breached its duty of care by failing to take steps to guard against the possibility of her tripping and falling in its store on 2 September 2006.

[23] The plaintiff's action is accordingly dismissed with costs.

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J G GROGAN

ACTING JUDGE OF THE HIGH COURT