FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: A140/2014

In the matter:

KAREN PIENAAR Appellant

and

VUKILE PROPERTY FUND Respondent

CORAM: VAN ZYL *et* DAFFUE, JJ *et* MIA, AJ

JUDGMENT BY: MIA AJ

HEARD ON: 11 MAY 2015

DELIVERED ON: 25 JUNE 2015

MIA AJ:

[1] On 3 June 2011 the appellant, Mrs. Pienaar, went shopping at the Bloem Centre (the Centre) in Bloemfontein during an extended lunch break. She moved between the levels of the shopping centre by using the escalator. As she proceeded to the escalator to move to another level she slipped, fell and sustained injuries. She testified that she slipped and fell when she stepped onto the porcelain tiles which were inserted among the travertine tiles in the area around the escalator. Mrs. Pienaar claimed an amount of R233, 188.96, from Vukile

Property Fund, the owner of the property. She alleged that Vukile Property Fund failed in its duty to keep the floor of the Centre reasonably safe for the public using the Centre. Vukile Property Fund (respondent) outsourced the cleaning of the Centre to a subcontractor who is not a party to these proceedings.

[2] As a result of a separation of issues in terms of Rule 33(4) of the Uniform Rules of Court, the Court a quo was called upon only to decide whether or not the respondent's negligence was the cause of the appellant's falling and injuring herself. At the end of the trial the Court a quo granted absolution from the instance. It is against such order that the appellant now appeals to the Full Bench of this Court, with the leave of the Court *a quo*.

[3] It is trite that the *onus* of proving negligence on a balance of probabilities rests with the plaintiff. (See **Arthur v Bezuidenhout and Mieny** 1962 (2) SA 566 (A) at 574H and 576G; **Sardi and Others v Standard and General Insurance Co Ltd** 1977 (3) SA 776 (A) at 780C - H and **Madyosi and Another v SA Eagle Insurance Co Ltd** 1990 (3) SA 442 (A) at 444D - G.)

[4] Negligence on the part of the respondent would be proved if it was clear that the respondent ought reasonably to have

foreseen that the tiles constituted a danger to the public when they became dirty and took no steps to avert the danger by cleaning the tiles or warning the public of the danger. The appellant testified and called an architect, Mr Andries Karel Stefanus Nel (Nel) as her expert. The respondent called the Centre manager Mrs. De Beer (De Beer).

[5] The appellant's case was that the travertine tiles were replaced with smooth glazed porcelain tiles close to the escalator. When the porcelain tiles became packed with dirt they lost their anti-slip properties and became slippery. The respondent did not deny that the appellant slipped and fell. The respondent disputed that appellant proved that the porcelain tiles were slippery or slippery on the day of the incident and caused her to fall. Further that the appellant failed to show that the respondent failed in its duty to keep the floors clean and maintained so as to prevent harm from occurring.

[6] Nel was a professional architect practicing at NBA Studios at the time of the trial in the Court *a quo*. He testified that he had 36 years of experience as an architect relating to shopping centres, malls and offices and specifically in forensic architecture. This entailed furnishing an opinion on building disputes in the building industry and covered a wide field relating to contractual claims as well as injuries. Nel was approached by appellant's attorneys to investigate the incident and possible cause of the appellant falling due to the tile

flooring. Nel had regard to photographs and the appellant's version upon instruction from the appellant's attorneys regarding the fall. He also visited the Centre to inspect the condition of the tiles generally and the tiles which were replaced.

[7] Nel found that the 99.9% of Centre was tiled with travertine tiles. In a few places the tiles were replaced with porcelain tiles. He expressed the view that it was preferable for the damaged travertine tiles which were replaced with porcelain tiles to be placed in less conspicuous areas. This was possible if travertine tiles were harvested from elsewhere in the Centre with less public traffic so as to ensure consistency of the tiles in the high traffic public area around the escalator. There were three tiles around the escalator that were replaced with glazed porcelain tiles. According to Nel the glazed porcelain tiles were not as porous as the travertine tiles. Dirt collected more readily on the surface and the glazed porcelain tile became slippery when covered with dirt. In contrast the travertine tile allowed more dirt to accumulate without causing the tiles to become slippery. The use of this glazed porcelain tile in a high traffic public area created a dangerous situation according to Nel if the tiles were not clean.

[8] De Beer indicated that the respondent contracted an independent contractor to clean the floors of the Centre. The

cleaning regime entailed two elements. In the evening the cleaning entailed that the Centre was swept and the floor scrubbed with detergents using automatic scrubbing machines. During the day the evidence indicated that eight cleaners were on duty with brooms to clean the floors. De Beer testified that she walked through the Centre at least two or three times per day when she was in Bloemfontein to check that personnel were doing what was required of them and that all was in order in the Centre. During these walks she would address any problems she came across. On the day the appellant fell she was on duty in Bloemfontein. In view of the Centre having at least 700 000 customers traversing the Centre, the tiles became dirty and were constantly cleaned. She did not previously encounter incidents with customers falling in the vicinity of the escalator where the appellant fell.

[9] Having considered all this evidence, the Court *a quo* found that the probabilities suggested that the appellant was running as she was late. The appellant wore smooth soled shoes as described by De Beer who saw them when she took off the appellant's shoe at the appellant's request. The Court *a quo* accepted De Beer's evidence as she would not have known ordinarily that the appellant had taken an early lunch break unless the appellant had informed her of this fact. The Court *a quo* was also not impressed by Nel as a witness as he did not offer any scientific test regarding the cleaning of the floor. There

was no evidence indicating how much of dirt the travertine tiles collected or exactly how smooth or slippery they became in comparison with the glazed porcelain tiles. Nel was not a cleaning expert. De Beer's evidence indicated that the independent contractor was contracted since 2008 to render cleaning services. They had not experienced any problems since 2008. De Beer also had insight into the security register on a regular basis to identify problems that required attention and the register did not reflect any incidents occurring in the particular spot near the escalator.

[10] The appellant's case that the respondent was responsible for a dangerous situation created by the act or omission of an independent contractor, *in casu* that a dangerous situation was created by the dirty tiles which caused her to slip and caused her injury is not ordinarily provided for in our law of delict. In **Chartaprops 16 (Pty) Ltd and Another v Silberman** 2009 (1) SA 265 (SCA) at 269 Nugent JA referred to **Colonial Mutual Life Assurance Society Ltd v MacDonald** which stated that**:**

> "A principal is liable for the acts of his agent where the agent is a servant but not where the agent is a contractor, sub-contractor or the servant of a contractor or sub-contractor."

The appellant elected to claim damages from the respondent who would ordinarily not be liable for the negligent acts of the subcontractor it engaged to clean the Centre.

[11] However Nugent, JA, pointed out at 270-271 that;

> "A defendant might nonetheless be liable for harm that arises from negligent conduct on the part of an independent contractor but where that occurs the liability does not arise vicariously. It arises instead from the breach of the defendant's own duty (I use that term to mean the obligation that arises when the reasonable possibility of injury ought to be foreseen in accordance with the classic test for negligence articulated in Kruger v Coetzee). It will arise where that duty that is cast upon the defendant to take steps 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 actually taken. The duty that is cast upon a defendant in those circumstances has been described (in the context of English law) as a duty that is not capable of being delegated: 'the performance of the duties, but not the responsibility for that performance, can be delegated to another'. Or as it has been expressed on another occasion, it is '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. "

[12] In the present matter the respondent's liability would arise from the breach of its duty to take reasonable steps to prevent injury which ought to have been foreseen. This is in accordance with the classic test for negligence expressed in **Kruger v Coetzee** 1966(2) SA 428 (A) where Holmes JA stated:

"For the purposes of liability *culpa* arises if-

(a) a *diligens paterfamilias* in the position of the defendant-

(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

(ii) would take reasonable steps to guard against such occurrence; and

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

In applying this test to the present matter it is evident that the respondent took steps to guard against harm. The respondent appointed a subcontractor to clean the premises and took steps to ensure that the performance of the duty was undertaken and that the necessary care was taken. This is clear from De Beer's testimony which shows what steps were taken by the respondent to ensure that the respondent met its duty to take care.

[13] Since Nel was not a cleaning expert and had no knowledge of the cleaning routine at the Centre, his evidence was not sufficient to show that the respondent had failed in its duty to take the necessary care. Only the evidence of a cleaning expert could rebut the respondent's evidence that the cleaning system employed by the respondent was adequate. The "tongue tip test" conducted by Nel, as counsel for the respondent referred to it, was not sufficient to indicate that the respondent did not

take reasonable care. The test entailed Nel wetting his finger and running it along the floor. This test was conducted a year later and not on the day the incident occurred. This was not an indication of the condition of the floors on the day the appellant slipped on the tiles. This test has no scientific basis or any skill set required in relation to cleaning the tiles. It is also not a reliable indication that the floors were not cleaned the night before the appellant slipped on the tiles or that the floors were not kept clean during the day by the cleaners when the appellant slipped.

[14] The evidence of De Beer that the respondent employed a contractor to maintain and clean the floors; that she checked on the staff regularly by walking and inspecting the Centre and checked the security book entries demonstrates the respondent's efforts to execute its duty to take care. It is evident from De Beer's evidence that the respondent did what was required to ensure that the floor of the Centre was maintained in a condition that was reasonably safe for customers. In applying the test in **Kruger v Coetzee** *supra*, one must be mindful of the fact that what is reasonable or which reasonable steps ought to be taken in a given set of circumstances would depend on the facts of the particular case. On the facts of this matter it is clear that the respondent took all reasonable steps to ensure that the tiles were clean and not slippery. The Court *a quo's* finding that the respondent did what was required of it and that it was not necessary to do more than what it had done, is unassailable.

The Court *a quo's* finding that the appellant did not succeed in showing that the respondent was negligent is in my view correct.

[15] For the reasons above I am of the view that the appeal should fail. In view hereof the costs should follow the cause.

[16] In the result the following order is made.

1. The appeal is dismissed with costs.

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S. C. MIA, AJ

I concur.

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C. VAN ZYL, J

I concur.

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J.P. DAFFUE, J

On behalf of the appellant: Adv. A Vorster
Instructed by:
Honey Attorneys
BLOEMFONTEIN

On behalf of the respondent:	Adv. S.J. Reinders Instructed by: McIntyre & Van Der Post BLOEMFONTEIN