IN THE HIGH COURT OF SOUTH AFRCA
[WESTERN CAPE DIVISION, CAPE TOWN]

[REPORTABLE]

Case no: A116/20

In the matter between:

NICOLENE HOLTZHAUSEN Appellant

and

CENPROP REAL ESTATE (PTY) LTD First Respondent
NAHEEL INVESTMENTS (PTY) LTD Second Respondent

Heard: 20 January 2021

JUDGMENT DELIVERED (VIA EMAIL) ON 3 MARCH 2021

SHER, J (ALLIE J et SAMELA J concurring):

1. This is an appeal against the judgment[1] and Order of this Court, whereby it dismissed a claim for damages which the appellant instituted against the respondents after she slipped and fell in the Goodwood Mall on 1 June 2013. At the time of the incident the Mall was owned by the second respondent ('Naheel') and was managed by the first respondent ('Cenprop').

The factual background

[1] Reported *sub nom Holzhausen v Cenprop Real Estate (Pty) Ltd* [2020] 1 All SA 767 (WCC).

2. The Goodwood Mall is a retail shopping complex which is located on the northern side of Voortrekker Road, Goodwood. Its two main entrances consist of a set of adjoining double glass doors, which are accessed via a parking lot on the south-western side of the complex, which is the predominant direction from which the winter rain comes in Cape Town.

3. On the morning of the incident the appellant went to the mall in order to draw money from an ATM. It was raining at the time and she was wearing rubber-soled, low-heeled 'winter' boots. She was accompanied by her daughter and her nephew, and was carrying her 11month old baby. She passed through one of the main entrances and crossed over a woven so-called 'walk-off' entrance mat, which was located just inside the entrance doors. There was a yellow 'wet floor' warning sign standing on the tiled floor, between the two sets of doors, and the appellant noted that the floor was wet and slippery.

4. She proceeded to make her way slowly in the mall, past a number of shops, towards Pick 'n Pay. After she had traversed about 20 paces (this was later measured as a distance of about 14 m from the entrance) her feet suddenly gave way from under her, and she fell. In order to break her fall and shield her baby she extended her right arm, and landed on it, fracturing the right proximal radius and neck of the elbow.

5. The appellant testified that she fell because the tiles were wet and slippery as a result of rain which had been carried in via the rain jackets, umbrellas and shoes of persons entering the mall. After she had fallen the appellant sent her daughter to fetch her mother, who was employed at Pick 'n Pay at the time. The appellant's mother confirmed that the spot where she found the appellant lying on the tiles a short while later, was very wet. With the assistance of a passer-by and a security guard the appellant was placed in a wheelchair and taken for medical attention.

The pleadings

6. In her particulars of claim the appellant alleged that the respondents had acted wrongfully and had been negligent in that they knew, or ought to have known, that the 'surface area' of the floor was slippery when it became wet and posed a

danger to members of the public who were required to walk across it, but despite this they had failed:

6.1 to prevent members of the public from accessing the area when it was wet, and/or

6.2 to ensure that the area did not become slippery when wet, and/or

6.3 to take adequate steps to prevent the appellant from slipping and falling, when they could and should have done so.

7. In their plea the respondents denied that they had been negligent, or that they had acted in breach of any legal duty which they may have owed the appellant. In amplification they averred that they had appointed competent and professional contractors to maintain, clean and check the premises and the 'surface area' of the floors at the mall, in order to ensure that they remained clean and would not be dangerous to members of the public.

8. To this end Cenprop, a professional property management company, and a competent and independent contractor, had been appointed to assist in the maintenance of the premises, including the 'surface area' of the floors of the mall, and it had in turn discharged its duties by:

8.1 appointing a professional cleaning company JKL Cleaning Solutions CC to '*inter alia* spot clean daily and any spillage in walkways with warning signage'(sic); and

8.2 appointing a professional security provider, Gabriel Protection Services (Pty) Ltd to call cleaning staff, if none were available, for spillage and litter in corridors (sic).

The evidence

9. In presenting their cases, both the appellant and the respondents made use of architects, as expert witnesses. Each of them inspected the area where the appellant had fallen and prepared reports which were submitted into evidence. The respondents' expert also conducted a rudimentary experiment in relation to the surface of the floors in the mall.

10. At the time of the incident the floors of the mall were paved with 600mm x 600mm glazed ceramic or porcelain tiles, which were in relatively good condition.

The tiles had been laid during the course of a refurbishment which had been carried out during 2010 by Growthpoint Properties, who owned the mall at the time, and were similar in appearance to tiles which had been used in the N1 City Mall, in Parow, a short distance away.

11. In his report the defendant's expert Hockly explained that in the USA and EU floor tiles are graded *inter alia* in terms of their so-called 'coefficient of friction' ('COF') value, or as it is more colloquially known, their 'resistance to slip'. This is a mathematical term which is determined by measuring the force required to move an object across the surface of the tile. Regrettably, in this country COF values are not published and floor tiles are simply marketed as either 'non-slip', 'slip-resistant', or 'polished'. With this limitation in mind Hockly was of the view that the floor tiles which had been selected for use in the mall could be considered as achieving a satisfactory balance between aesthetics and practicality. However, he was also of the view that they could be considered as potentially dangerous underfoot, when they were wet. He came to this conclusion after inspecting the tiles and conducting a wet and dry test of their surface, by touching them and rubbing the soles of his shoes across them.

12. In like vein, in a report which the plaintiff's expert Bester filed a year later he came to the considered opinion that the tiles would be 'dangerously slippery' when wet. He was of the view that they could not be considered 'slip-resistant' as they were very smooth and had 'little or no texture to touch', and he consequently did not consider them as suitable for use in a shopping mall, with its high volumes of passing traffic.

13. Aside from their expert, the respondents also led the evidence of the manager of the mall, Albert De Jager, who was employed by Growthpoint Properties at the time when it acquired the mall and refurbished it. He testified that after the revamp Growthpoint sold the mall to Cenprop, and it had in turn sold it to the St Tropez Property Group, which had then on-sold it to Naheel, which he described as a 'division' of St Tropez. Throughout these transfers of ownership De Jager was retained as the manager of the mall, and he continued to occupy this position as an employee of Cenprop up to the time of the incident.

14. In their plea the respondents pointed out that Cenprop had been appointed to manage the mall in terms of a 'management agreement' which was set out in a letter dated 8 November 2011. It contained a proposal by Cenprop to manage Naheel's properties on a 'daily' basis, and offered a range of 'management services', including physically inspecting the properties on a regular basis and maintaining the buildings and grounds which were situated thereon, in good condition. For the rest, the proposal offered the collection of monthly rentals, the renewal of tenant leases, and the sourcing of new tenants, on a part fee part commission basis.

15. On his arrival at the mall in 2010 De Jager found a cleaning service JKL Cleaning Solutions CC ('JKL') in place, which was operating in terms of an oral agreement it had with the mall's former owners. When asked, in evidence in chief, to explain what the nature of this agreement was he said it was 'very difficult to say...essentially they had to keep the malls clean'. At some stage a contract of sorts was drawn up between JKL and the new owners, but it was never signed by the parties. During cross-examination he described the status of this contract as 'just a good faith agreement…it wasn't a contractual thing at all' (sic).

16. JKL had a total of 5 cleaners in their employ who worked in 2 shifts between 06h00 and 19h00 each working day: 3 in the morning and 2 in the afternoon. They cleaned the corridors and the public toilets in the mall. According to De Jager, when they were busy mopping or cleaning floors they would put up so-called 'wet floor' signs ie boards warning passersby that the area was wet, and they also did so when it was raining. The wording of these boards was never canvassed in evidence.

17. That then was the sum total of the evidence which was tendered in relation to JKL's cleaning duties, and its cleaning regime, such as it was. In this regard I may mention that the only reference in the record to any written instruction as to the work which JKL was required to perform is that which is set out in Annexure B to the unsigned contract, where it is recorded that it was required to sweep and mop the tiled floors and, as was stated in the respondents' plea, to 'spot clean daily any spillage in walkways with warning signage'(sic).

18. On the day of the incident a security company, Gabriel Protection Services (Pty) Ltd, commenced duties at the mall. It too had a contract of sorts with Cenprop, which was only signed by its director, but not by Cenprop. In terms of its Standard Operating Procedure its security guards were required to call cleaning staff if 'none were available' (sic), for 'spillage' and litter that was found in corridors.

19. Lastly, it may be mentioned that De Jager testified that aside from a daily morning inspection of the mall and the public toilets, he would regularly walk through the mall and if he noticed anything that needed to be 'cleaned up' he would notify the cleaning service. He did not testify as to having conducted any inspection of the mall on the morning of the incident and offered no evidence as to the condition of the floors at that time, nor did he give evidence about any instruction that he gave to the cleaners that morning in relation to the floors and he was not on the scene of the incident when it happened, nor did he attend on the appellant whilst she was waiting for assistance after she had fallen. He only became aware of the incident later in the day, after it was reported to him by the owner of the security company, Jacques Wolhuter.

20. It is common cause that at the time when the appellant fell and until she left the mall to get medical attention, no cleaners were in attendance in the corridor where the incident occurred i.e. between the entrance doors and the spot where she fell. Even when Wolhuter arrived on the scene sometime after the appellant had already left, he saw no cleaners. According to him the floor was dry by that time and a 'wet floor' warning sign had been placed at the spot where the appellant had fallen.

The law

21. Before considering the judgment of the Court a *quo*, it is necessary to discuss the legal principles which have evolved and which are applicable in matters such as these.

22. In the first place, it is by now long established in our law that the owner or other person or entity in control of a shopping mall has a legal duty to take reasonable steps to ensure that its premises are 'reasonably safe' for those members of the

public who might frequent them.[2] What such steps may be will depend on the circumstances.

23. A failure to take such steps will constitute wrongful conduct, but that in itself will not suffice to impose delictual liability without the necessary fault element i.e. *culpa.* Whether that is present is determined by conducting the enquiry postulated by Holmes JA in *Kruger v Coetzee*[3] viz asking whether a reasonable man in the position of the owner or other person in control of the premises would 1) have foreseen the risk of danger or harm occurring were such steps not taken and 2) would have taken such steps; and the defendant failed to take them. The answer, in each particular case, to the questions which are to be posed in terms of *Kruger* depends in turn on the circumstances pertaining to the risk of danger or harm occurring, including the nature and possible extent thereof, the context in which it might occur, and the degree of expertise and the means available to the owner or person in control of the premises, to avert it.[4]

24. Thus, in summary, the owner or person or entity in control of a mall will only potentially be liable for harm or danger which would have been foreseeable to the hypothetical reasonable man in its position, and is obliged to take no more than reasonable steps to guard against such harm occurring.

25. Whether the steps that were taken in a particular case are to be regarded as reasonable or not depends upon a consideration of all the facts and circumstances, and merely because harm which was foreseeable did eventuate does not mean that the steps which were taken to avoid it were necessarily unreasonable. Ultimately the inquiry involves a value judgement on the part of the Court.[5]

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[2] *Probst v Pick 'n Pay Retailers* [1998] 2 All SA 186 (W) at 200d-e; *Chartaprops 16 (Pty) Ltd & 1 Or v Silberman* 2009 (1) SA 265 (SCA) at para [18]; *Avonmore Supermarket CC v Venter* 2014 (5) SA 399 (SCA) para [16].

[3] 1966 (2) SA 428 (A) 430E-H.

[4] *Langley Fox Building Partnership (Pty) Ltd v De Valence* 1991 (1) SA 1 (A) at 13A-B, where Goldstone AJA adopted the test in *Kruger v Coetzee* as the test for whether the defendant employer of a contractor owed a legal duty of care. Thus, as was pointed out by Nugent JA in *Pienaar & Ors v Brown & Ors* 2010 (6) SA 365 (SCA) para [30], the test for wrongfulness and for *culpa* in matters where an employer has contracted an independent contractor are in substance the same.

[5] *Pretoria City Council v De Jager* 1997 (2) SA 46 (A) at 55H-56C, cited with approval in *Chartaprops* n 2 para [48] and *Pienaar* n 4, para [12].

26. As an obvious incident of the duty to take reasonable steps to ensure that a shopping mall is reasonably safe, it is by now also well established in our law that the owner or other person or entity in control of it is required to take reasonable steps to ensure that its floors are reasonably safe.[6]

27. It commonly happens that floors in shopping malls are rendered unsafe because something lands on them which makes them slippery and dangerous and the law reports are replete with cases of this nature, which are referred to as so-called 'spillage' cases, because they usually involve a liquid or fluid being spilt onto the floor.[7]

28. It has been held that a reasonable person in control of a shopping mall would clearly foresee that spillages might occur in its passages and might cause harm if they were permitted to remain, and would therefore take reasonable steps to guard against such harm eventuating as a result thereof.[8] If, as was held in *Avonmore Supermarket* [9] it is reasonably foreseeable that a person may slip and fall as a result of a damp floor, all the more so if the floor is wet.

29. In *Probst*, the *locus classicus* of spillage cases, Stegmann J held[10] that the duty which rests on a shopkeeper to take reasonable steps to ensure that the floors of its premises are reasonably safe for customers is not so onerous as to require it to discover and clean up every spillage, as and when it occurs. All that is required is that the shopkeeper has a system in place which will ensure that spillages are not allowed to create potential hazards for any 'material' length of time, and which will allow for them to be discovered and for the floor to made safe, with 'reasonable promptitude'.

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[6] *Alberts v Engelbrecht* 1961 (2) SA 644 (T); *Gordon v De Mata* 1969 (3) SA 285 (A); *Probst* n 2; *Monteoli v Woolworths (Pty) Ltd* 2000 (4) SA 735 (W); *Brauns v Shoprite Checkers* 2004 (6) SA 211 (ECD); *Chartaprops* n 2 at para [18]; *Checkers Supermarket v Lindsay* [2009] ZASCA 26.

[7] Vide *Probst* n 2 and *Checkers Supermarket* n 6 (oil); *Alberts* n 6 (wet polish); *Ward v Tesco Stores* [1976] 1 All ER 219 (CA) (yoghurt); *Jones v Maceys of Salisbury (Pty) Ltd* 1982 (2) SA 139 (Z) (ice-cream); *Lunderstedt v Pick 'n Pay Retailers* (WLD Case no 9016138 cited in *Probst* at 199b) (cleaning fluid and water); *Brauns* n 6 (water) *Avonmore Supermarket CC* n 2 (water). In *Gordon v De Mata* 1969 (3) SA 285 (A) the plaintiff slipped and fell on a cabbage leaf which had landed on the floor.

[8] *Chartaprops* n 2 at para [16]; *Brauns* n 6 at 217E-F.

[9] Note 2, para [15].

[10] *Id*, at 200f.

30. In the light of this test, spillage cases are all about the nature and extent of the cleaning system and regime which was in place at the time when, and at the place where, the plaintiff slipped and fell; and the evidence which is led in this regard is directed at dealing with the issue of whether or not the measures which were in place to deal with spillages, were reasonable.

31. Invariably, the owner or other person or entity in control of a shopping mall, or a shop such as a supermarket within a mall, will contract a cleaning service that will be expected to attend to keeping the floors clean and to removing any spillages which may occur, and will not personally attend to this, for obvious reasons. Frequently such a cleaning service is an independent contractor and not an employee of the owner or person in control of the mall, or shop. In many instances the owner will simply contract an entity to manage the mall or shop, and will leave it to such entity, as part of the discharge of its obligation to manage and maintain the premises, to contract an outside cleaning service to attend to the cleaning of the mall or shop, as the case may be, including any spillages which may occur.

32. In situations where the owner has contracted out its responsibility of keeping the floors of its premises clean, to an independent contractor, both in respect of any dirt which may accumulate naturally and in respect of spillages which may occur, the question which arises is whether by doing so it is entitled to avoid liability in respect of any claims which may arise, as a result of a failure on the part of the contractor to discharge its obligations. In this regard, as early as 1931 the Appellate Division confirmed in *Colonial Mutual Life Assurance Society Ltd* [11] that whereas in our law a principal is liable for the acts of an agent, who is its servant, it is generally not liable for the acts of an agent who is an (independent) contractor or sub-contractor, nor for any acts performed by the servants of any such contractor.

33. However, notwithstanding this decision, and as a result of the influence of English law and its treatment of certain so-called ‘duty of care’ cases (a concept

[11] *Colonial Mutual Life Assurance Society Ltd v MacDonald* 1931 AD 412.

in English law which conflates wrongfulness and negligence[12]), pursuant to the decision of the Appellate Division 6 years later in *Dukes v Marthinusen,*[13] in a number of instances, including *Probst,* [14] our Courts held that liability did attach to a principal, even where it had contracted an independent 3rd party to perform work or to discharge duties, on its behalf. Thus, in *Probst* the owners of a supermarket were held liable for the deficiencies of a cleaning system which had been implemented by an independent, outside cleaning service they had contracted, and which deficiencies had resulted in the plaintiff slipping and falling on cooking oil which had been spilt.

34. A useful discussion of some of these cases can be found in the minority and majority judgments in *Chartaprops*.[15] For the purposes of what follows, it is only necessary to refer to the more important of these decisions.

35. In *Dukes* the plaintiff's husband was killed when a wall of a cottage which was in the process of being demolished fell onto him as he was passing by, as a result of heavy materials which had been stacked against it by the demolition contractor's employees. Stratford ACJ considered a number of English cases which had been decided in the late 1800s, which variously held that whereas an employer could delegate work to a contractor which might involve a risk of harm to third parties it could not delegate its responsibility for the consequences thereof. Thus, where persons were injured as a result of such work which had been improperly performed, the employer remained liable for any claims which might arise therefrom. After reviewing SA cases on this issue and the decision in *Colonial Mutual,* the Acting Chief Justice concluded[16] that our law on this aspect was in accordance with English law. Thus, where there was a duty on an employer to take precautions to protect members of the public, which was the case in matters involving work which was dangerous i.e. which posed a risk of injury or harm to third parties, such duty could not be delegated, and the

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[12] *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) at 144F.
[13] 1937 AD 12.
[14] *Id*, n 2 at 200g and *Crawhall v Minister of Transport* 1963 (3) SA 614 (T).
[15] Note 2.
[16] Tindall AJA concurring.

employment of an independent contractor to perform the work was 'irrelevant'.[17] In such instances the employer was under a duty to ensure that the necessary precautions were taken by the contractor he had appointed, and if they were not, he would be liable for the contractor's default.

36. Some 30 years later this Court had occasion to consider the ambit of the decision in *Dukes*, in *Rhodes Fruit Farms Ltd v Cape Town City Council,* [18] a matter which concerned an objection by a plaintiff to an application by the defendant for leave to amend its plea. The basis of the plaintiff's objection was that if the amendment were allowed it would render the plea excipiable. The defendant sought, by way of its proposed amendment, to contend that the work which had given rise to the claim was of a specialized nature and had been performed by an independent contractor and that it was accordingly not liable for the consequences thereof. The plaintiff contended that on the basis of the decision in *Dukes* the duty to take reasonable precautions fell on the defendant and could not be delegated by it to an independent contractor, and it consequently remained liable for the acts of the contractor.

37. The plaintiff had sought to claim compensation from the Cape Town municipality after its properties had been damaged by flooding, when the sluice gates of a dam were opened. It contended the damage had occurred because the flow of the water was excessive as a result of a defect in the construction. The municipality sought to plead that it had appointed an independent board of engineers to design the dam, which had been built by municipal workers under the supervision of, and according to the design specifications which were laid down by, the engineers.

38. Van Wyk J held that *Dukes* did not support the proposition that the employment of a skilled independent contractor to perform work could never absolve an employer from liability in respect of the consequences thereof, and no such principle existed in terms of Roman-Dutch law. This was particularly the case where the extent of any danger which might attend on the performance of the

[17] *Id*, at 23.
[18] 1968 (3) SA 514 (CPD).

work and the 'reasonably practicable' measures which were to be taken to minimize it, could only be determined by a skilled and independent contractor.[19] Consequently, there might well be instances where an employer could rely entirely on an independent contractor to take all reasonable precautions to avoid harm to another, and would not be held to have been negligent where the contractor had failed to do so.[20]

39. In the circumstances, Van Wyk J was of the view that the decision in *Dukes* 'laid down no more' than that if work which was entrusted to an independent contractor was of such a nature that danger would ensue unless it was done with the necessary precautions being taken, the employer would be liable for any failure on the part of the contractor, to take such precautions.[21]

40. The issue of the liability of an employer for the acts of an independent contractor came up for reconsideration by the Appellate Division in 1991, in *Langley Fox.*[22] The plaintiff had been injured when she had walked into a wooden beam which was suspended on trestles across a sidewalk, by a subcontractor who was commissioned to install a ceiling under an overhead canopy.

41. Goldstone AJA for the full court, reaffirmed that the general principle in our law, as per the decision in *Colonial Mutual*, is that an employer is ordinarily not responsible for the negligence or wrongdoing of an independent contractor which he has employed, and although this was also the position in English law, for over a century its courts had recognized exceptions to it, in instances where the employer was said to be under a 'non-delegable' duty of care. It appears, from the discussion of these English cases in *Langley Fox* and *Chartaprops*, that they involved instances where 'dangerous things' or a 'special' risk of harm or danger to the public was present, or where the nature of the relationship between the plaintiff and the employer was such that there was a 'special vulnerability' present – such as in teacher-pupil and hospital-patient settings.

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[19] *Id*, 519D-E.
[20] *Id*, 519F-G.
[21] *Id*.
[22] Note 4.

42. After a careful and exhaustive analysis of the ratio of the decision in *Dukes,* Goldstone AJA concluded that the effect of the principle which it had laid down was to impose a form of vicarious liability on the employer of an independent contractor, which was 'unknown in our law of delict' [23] (as had previously been pointed out by Van Wyk J in *Rhodes Fruit Farms*).

43. In his view, the proper approach to the question of the liability of an employer for the negligence of an independent contractor was to apply the basic principles of Aquilian liability in our law, which require an employer to exercise that degree of care which the circumstances demand in each instance.[24]

44. Thus, whether an employer will have a legal duty in respect of the obligations of a contractor will ultimately depend on whether a *diligens paterfamilias* in his position would foresee the likelihood of danger or harm occurring in respect of the work to be carried out by the contractor and would take steps to guard against it.[25] As previously pointed out, this will in turn depend on the nature of the danger or harm and the context in which it might arise, the degree of skill and expertise available to the employer and the contractor, and the means available to the employer to avert the danger or harm.[26]

45. Applying this test to the facts before it the Appeal Court held[27] that whatever the arrangement between the employer and the sub-contractor was (and the question of whether precautions had to be taken as between them was a matter which depended upon the terms of their contract), as far as members of the public were concerned the employer (who was a building contractor) had been under a duty to take precautions to ensure that the erection of the canopy and ceiling for it, was effected safely, and it had failed to discharge this duty by ensuring that the area where the obstruction was to be erected, was cordoned off. Thus, in *Langley Fox* the employer could not avoid liability by contending that it had left the work which was to be performed, to a competent and skilled sub-

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[23] *Id*, 10H-J.
[24] As set out in *Cape Town Municipality v Paine* 1923 AD 207 at 217.
[25] *Langley Fox* n 4 at 11E-H.
[26] *Id*, 13B-C.
[27] *Id*, 14E.

contractor, and that the sub-contractor should be held liable for the damages which had been sustained by the plaintiff.

46. The issue of a mall owner's liability for the actions of an independent cleaning contractor pertinently came up for consideration by the Supreme Court of Appeal in *Chartaprops*.[28]

47. The plaintiff had slipped on unknown spillage which had been lying on the floor of a mall for more than 30 minutes, and had injured herself. The court a *quo* held that the owner (Chartaprops), who was in control of the mall, and the independent cleaning contractors it had employed to keep the mall clean, were liable jointly and severally for the damages which the plaintiff had sustained.

48. The cleaning contractors were held liable on the basis of the test set out in *Probst* because their cleaning regime was inadequate, as it failed to allow them to detect and remove spillages within a reasonable period of time. The owner was held to be vicariously liable for the failures of the cleaners. It appears that the court arrived at this finding on the basis of the principle which was laid down in *Dukes* i.e. that the owner-employer's 'duty of care' towards customers was a non-delegable duty ie one which could not be transferred to the cleaners.

49. On appeal the Supreme Court of Appeal reversed the decision that the owner was liable. It held[29] by a majority of 4-1, that the body of law which had built up around the adoption of the so-called 'non-delegable duty of care' principle in cases in England and Australia, had rightly been criticized by a number of judges and prominent scholars[30] as arbitrary and in certain instances even irrational; and had resulted in continuing uncertainty as to the state of the law, as it was subject to the random whim of individual judges who had rendered conflicting decisions.

50. Ponnan JA held[31] that the concept of liability on the basis of a 'non-delegable' personal duty substituted a duty to take reasonable care with a more 'stringent' duty to ensure that reasonable care was taken by another, and deviated from the generally accepted principle that a person should not be held liable for the acts of

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[28] Note 2.
[29] Per Ponnan JA (Scott, Maya JJA and Leach AJA concurring, and Nugent JA dissenting).
[30] Including Profs Glanville Williams and John Fleming.
[31] *Id*, para [38].

another, unless he was himself at fault.[32] The application of the concept could result in a blameless employer being held liable for the fault i.e. negligence of an independent contractor, contrary to the principle which was set out in *Colonial Mutual* and accordingly constituted a form of strict liability, or at least a 'disguised' and legally indefensible form of vicarious liability, which was repugnant to our law.

51. Ponnan JA consequently was of the view that the response of our law to the question of whether an employer should be held liable for the acts of a contractor should be determined on an application of the principles which were set out in *Langley Fox* [33] i.e. that the employer is required only to exercise that standard of care which the circumstances demand. Thus, where there is a situation involving an abnormally high risk or 'especial vulnerabilities' our law would expect greater vigilance on the part of the defendant i.e. a 'higher' standard of care, in order to prevent foreseeable harm from materializing,[34] and *vice versa* where the risk of harm or danger is low.

52. In *Chartaprops* the owner had contracted the duty of keeping the mall's floors clean and thereby safe, to a competent cleaning contractor, which had set up an apparently satisfactory cleaning regime. The owner had monitored the contractor's compliance with its cleaning duties by regularly consulting the contractor's cleaning supervisor and inspecting the floors, and had no means of knowing that the cleaning system which had been implemented was deficiently executed on the day of the incident. In the circumstances it was clearly blameless in regard to the incident and had discharged its duty to take reasonable steps to ensure that the floors of the mall were safe. The SCA held that inasmuch as the incident had been caused solely by the negligence of the independent cleaning contractor, it alone was to be held responsible for the damages which had been sustained by the plaintiff.

The judgment a *quo*

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[32] Para [35].
[33] Which are based on the approach which was adopted in *Cape Town Municipality v Paine* n 24.
[34] Para [39].

53. The court a *quo* was of the view that the question which it was required to answer was whether, in circumstances where the floor tiles had a propensity for being slippery when they were wet, it could be said that either Cenprop or Naheel had been negligent in relation to the presence of water on the tiles at the spot where the plaintiff fell.[35] It correctly pointed out that the fact that the tiles became slippery when they were wet was something which appeared to be known to both the defendant parties.

54. Consequently, it was of the view that the matter involved the situation which had been described in *Probst,* in that a potentially dangerous situation had occurred because of inclement weather conditions outside the mall which had led to shoppers transporting quantities of water into it, as a result of which the floor tiles had become slippery. In the circumstances Naheel was required to ensure that the cleaning contractors (JKL) put a system in place which would 'minimize the risk' which such 'residual' water might pose to shoppers.[36]

55. The court went on to discuss what it considered to be the legal principles which were applicable, with reference to the decisions in *Probst* and *Avonmore Supermarket,* as well as in *Chartaprops*, which it considered to be on all fours with the matter which was before it.[37]

56. It came to the conclusion that Naheel was exempt from liability because it had appointed a duly qualified management company to attend to the 'daily running' and maintenance of the mall.[38] It arrived at a similar conclusion in respect of Cenprop, as it had appointed a competent cleaning contractor to keep the premises clean and free of spillages and De Jager inspected the mall on a regular basis, and in terms of the agreement which Cenprop had with Gabriel Protection Services its security guards were required to be on the lookout for 'potential harm' and to call the cleaners if they were needed. In the circumstances, Cenprop had accordingly done all that it could reasonably be expected to do.

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[35] At para [20].
[36] *Id*.
[37] Para [39].
[38] Para [33].

57. On the other hand, the court was of the view that as JKL was the party which was 'directly' responsible for cleaning the floors of the mall and had put up 'wet floor' signs that day, well knowing that it was raining and that water was likely to be transported into the mall, it bore the 'ultimate responsibility' i.e. the duty to ensure that it was 'safe for the plaintiff to venture into the mall with her children' .[39] And as it had not been cited as a defendant, the action had to fail.

An assessment

58. In my view, the court a *quo* erred in a number of fundamental and material respects. In the first place, it erred in holding that the legal duty to take reasonable steps to safeguard the plaintiff from harm that day, ultimately fell on JKL. That duty was one which fell primarily and squarely on Naheel as owner of the mall, and in the second place on Cenprop, the management company which it had contracted to manage the mall on its behalf, and not on JKL as an independent contractor who was only responsible for cleaning the mall, and that much is abundantly clear from the decisions I have referred to in the discussion which precedes this.

59. It would be a startling state of affairs if independent cleaning contractors in shopping malls who are only contracted to keep floors clean became saddled with a duty to safeguard those who frequent the mall premises, and became liable to them on this basis in the event that they failed to comply with their contractual cleaning duties. As I understand it, none of the cases I have referred to have gone so far as to suggest that such a duty should lie on such contractors[40] and the basis on which they are commonly held liable is that they

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[39] Para [40].

[40] In *Chartaprops* n 2 at para [22] Nugent JA pointed out that whereas a person who contracts to clean a floor that is used by members of the public-either under a contract of employment or some other form of contract-is bound to his employer in respect of his contractual obligations, it did not necessarily follow that he will be liable to 3rd parties in delict if he failed to do so, even if his omission satisfies the ordinary test for negligence as set out in *Kruger v Coetzee*. In his view, the same considerations that cast upon the person in control of the shopping mall a duty to ensure that precautions are taken to keep the floors safe militated against an action lying against the cleaners in this regard, for it was on that person rather than the cleaners that the public relied for their safety, *vide* para [24]. In his judgment on behalf of the majority Ponnan JA accepted that the court a *quo* had correctly held that the cleaners were liable for the plaintiff's injuries, without alluding to the basis for such liability, other than that they had been negligent and the damages which had been sustained by the plaintiff had been caused solely by their wrongful actions or omissions. It appears from the introductory remarks by Nugent JA at para [4] of his judgment that the

have failed to have an adequate cleaning system in place, which would enable them to detect and remove spillages within a reasonable period of time, and that is the extent of their legal duty to those who use the floors they are required to keep clean. Obviously, if they comply with their contractual obligations to keep floors clean and free of spillages, this will result in the floors being safe for use by persons who walk across them, and if they don't, the floors, or at least a particular section of the floors, may become unsafe.

60. But the duty to take reasonable steps to safeguard visitors to a mall and the floors in it from the risk of danger or harm, falls on the owner and any person or entity who/which may be in control of the premises, and not on cleaning contractors, at least not those who are independent. The situation may well be different in respect of in-house cleaners, who are employed by the owner or entity in control of a mall. In such instances the owner or entity in control, as the case may be, may be liable vicariously for their actions or omissions[41] because as employees they are subject to the duty which rests upon their employer to guard against the risk of harm or danger to customers.

61. In any event, in terms of the agreement which it had with Cenprop, JKL was not required to dry floors when they became wet. It was only required to keep them clean and free of 'spillages'. By this I understand that its cleaners had, at most, a duty to clean up the odd and accidental spillage of fluid or liquid that might occur from time to time at a specific spot on the floors. They were not responsible for any defect which might lie in the make-up or composition of the floors, which might render them inherently unsafe or dangerous when it rained.

62. In my view the rain water which was brought into the mall by those who entered it that morning could hardly be said to constitute a 'spillage'. As I see it, spillage cases deal with instances where a floor which would in the ordinary course of normal everyday use be safe, becomes unsafe when something is accidentally

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basis for the finding by the court a *quo* that the cleaners were liable was that they had failed to detect and remove the spillage with reasonable promptitude, because their cleaning system was deficient, a la *Probst*.

[41] This seems to have been the basis for the decision in *Avonmore Supermarket*, where a cleaner who was employed by the supermarket had mopped a floor and left it wet, without warning customers or cordoning off the area.

spilt onto it. Such cases must be distinguished from instances such as this one where floors are inherently unsafe or dangerous because of their condition or their composition, for example wooden floors that become infected with wood borer beetle, or which rot because of the ingress of water, or floors which collapse because they were not properly designed or erected, or because the materials from which they were constructed are inappropriate or not strong enough to carry the load they are intended to carry.

63. The problem with the floor on which the plaintiff slipped and fell was that it was laid over with tiles which were dangerous in certain conditions i.e. when they became wet. As such the tiles constituted a hazard when they were wet, but this did not make the incident which occurred a 'spillage' case.

64. In my view the court a *quo* therefore erred fundamentally in its characterization of the matter as one involving what might, for the sake of convenience, be referred to as a 'cleaning' issue, rather than one involving a hazardous situation. As a result of this, it wrongly treated the matter as if it was a spillage case, and wrongly applied to it the principles which are applicable in such cases, as set out in *Probst* and *Chartaprops,* and wrongly framed the question of whether the respondents had been negligent, as an enquiry into whether they had been negligent 'in relation to the presence of water' on the tiles at the spot where the plaintiff fell. That would be the question which one would ask of the cleaners in a spillage case, but it is not the question which one asks of the owner and management company in control of a shopping mall, where tiles that may be dangerous in certain conditions, have been laid.

65. It will have been noted from what is set out above in relation to the pleadings[42] that the appellant made no allegations in her particulars of claim that the defendants were negligent in any way or form, because of any deficiencies or failures in relation to the *cleaning system* which was in place in the mall. This was because she did not consider this to be a spillage matter.

[42] At para [6].

66. At the outset of proceedings plaintiff's counsel pointed out that the matter was not one analogous to that which one finds in so-called spillage cases. As he put it:

'M'Lord, the issue in this case is that the situation was not a situation of a spillage. It's a-the floor is wet because it's raining, and with the greatest will in the world, cleaners would not be able to walk behind every person and make sure that the floor is dry…Every person who walks in, brings water with them. So, it's a dangerous situation, and that is why we say that this case is different to where you can absolve yourself from liability."

And a bit further on in his address he again made his position clear:

'M'Lord, this certainly isn't a question of spot-cleaning. This is a question of the floor which is wet because of the inclement weather and people are invited to enter these premises, you know, do their shopping, and we say both architects admit that when this floor is wet, it is potentially dangerous…. M'Lord our case then is, because of the nature of the tiles, the defendants couldn't absolve themselves by getting cleaners.' [43]

67. The plaintiff's counsel's submissions were confirmed by Bester, in his evidence. He explained that the floor tiles were 'too smooth' and in order to keep them safe one would have to take extraordinary care with their maintenance and cleaning:

'And the point I make there, with a bit of understatement, I would say, is in wet weather this would pose a challenge on an ongoing basis. I do not know how one would keep a floor dry when you've got public traffic into a building from wet conditions on a constant basis. You would have to have somebody cleaning almost behind every person. It wouldn't be….

Mr McClarty: Behind or in front?

Mr Bester: Perhaps both.'

In his view it would accordingly be almost impossible to keep the tiles 'sufficiently dry' so as not to be dangerous in wet weather, by using cleaners.

68. Once again, Bester explained this in his evidence as follows:

'And bear in mind, Sir, again, that we're not talking about an accident, the spillage of fruit juice; we're talking about where rain is being trafficked into the building on a constant basis in the way this mall-this mall, this access corridor is exposed to rainwater in a way that buildings are not always (sic) and in those contexts, that would be a fair enough tile. But in this case, you have a constant traffic, when it is raining, of water into the building, and that makes it dangerous. '

[43] That the defendants were alive to this being the essence of the plaintiff's case is evident if one has regard for the remark which was made by their counsel during cross-examination of the plaintiff (at p 176:9-11) viz that the defendants understood that she was contending that the mall should have had 'better' tiles, which did not become slippery and dangerous when wet.

69. In the circumstances this was not a matter where the adequacy of JKL's cleaning system was in issue, as the plaintiff's fall was not occasioned by a failure on the part of the cleaners to detect the water on the tiles and to remove it with 'reasonable promptitude', as is the case in spillage matters. Put simply, and using the language which was adopted in *Chartaprops* one cannot fairly blame the cleaners for what happened. The fault, if any, can only lie with the owner and the managers of the mall.

70. If one goes back to first principles, the following emerges. In the first place, it is trite that Naheel as owner, and Cenprop as the manager of the mall, had a legal duty to take reasonable steps to ensure that the mall, and the floors in it, were reasonably safe for those who entered the mall.

71. De Jager was aware of two previous incidents when visitors to the mall had slipped and fallen. In one incident a shopper had slipped and fallen on juice that was lying on the floor in Pick 'n Pay, in the other a child had fallen on an ice-cream which he had dropped. It was never suggested by De Jager in his evidence that these were spillage cases, in the sense that the victims had slipped and fallen because of spillages which had not been detected and removed with reasonable promptitude. In fact, the impression I get from his evidence, at least insofar as the ice cream incident is concerned is that the slip and fall occurred spontaneously when the ice cream fell. Thus, from these incidents it would have been clear to any reasonably experienced mall manager that the tiles were slippery and dangerous when they were wet, and not that there was a problem with the cleaning of the mall.

72. That De Jager must have been aware of the dangerous nature of the floor tiles when they were wet is evident from the remarks which he made to the plaintiff's mother when he approached her in Pick 'n Pay some two days after the incident. In this regard, she testified that he told her that when it rained he wasn't able to put up 'wet floor' signs 'everywhere' and he could not clean 'everywhere'. At the very least, in the context of the known and common cause facts, this statement must be understood as an appreciation on his part that when it rained there was a 'global' risk of danger in the wet areas i.e. the corridors leading off from the

entrance doors which faced directly in the direction from which the rain usually comes in winter i.e. the south-west, and that it would be difficult to safeguard persons who were using those corridors from the risk of slipping and falling. In the circumstances he clearly knew that it would not be possible for the cleaners to keep the entire floor areas in that section dry, when there was a constant traffic of wet people entering through the entrance doors to those areas.

73. If one then turns to the 'negligence' enquiry which must be conducted in terms of *Kruger v Coetzee*, in my view in such circumstances the reasonable, hypothetical owner and manager of a mall, would clearly have foreseen the risk of danger or harm occurring i.e. persons slipping and falling in those areas of the mall, and would have taken steps to prevent this from happening. In this case neither of the defendants took any such steps. They didn't even try to ensure that, at the very least, the risk of a slip and fall was 'minimized', by contracting JKL to employ a sufficient cohort of cleaners to dry those sections of the floors that became wet when it rained, at the entrances on the south/south-western side of the mall.

74. Bester pointed out that the 1.8m wide woven polypropylene 'walk-off' entrance mat which was intended to trap dirt and fluids from being carried into the mall, would only serve its purpose in respect of what was being carried in on the feet of those who were entering the mall. In his view, even for this purpose the mat was inadequate, as it was too narrow 'by normal standards'. In this regard he pointed out that a tall person's stride would be such that they were likely to only tread once on the mat, with one of their feet. Furthermore, from his inspection he noted that the mat was old and 'shaggy' and worn out in places, and it had been seated in a very shallow well. In the circumstances it was not fit for purpose. In fact, it was evident from a photograph which the appellant handed in that when it rained the mat became water-logged and served as an added source of water which could be carried into the mall, by those who stepped on it, or wiped their feet on it. Once again, in this respect the respondents were negligent, and failed to take steps that one would have expected them to take. In this regard a competent management company would have inspected the mat regularly and would have noted that it was itself a potential source of danger for anyone who

stepped on it and proceeded to walk on the tiles when it was raining, and would have replaced it with a new and wider/longer mat, when it was no longer able to serve its intended purpose.

75. Bester testified that the most obvious solution to the problem for the respondents was to acquire roll-out polypropylene ‘runner’ mats with rubber edges, such as the small one which had been placed on the inside of the entrance doors, which could be rolled out an appropriate distance along the corridors, from the entrances on the south/south-western side. These would then serve to soak up any excess water that was carried into the mall, not only on the feet of passersby, but also on their clothes and umbrellas.

76. Finally, the most obvious solution available to the respondents was to close those particular entrances at times when they were subject to rain from the south/southwest to such an extent that rain water was being carried in to the mall, and to divert shoppers to other entrances. From the evidence and the lay-out plan of the mall it appears that there were other entrances nearby which could easily have been used, at minimal inconvenience to shoppers.

77. It was not suggested by the respondents that these solutions were impossible to adopt, either for logistical or for economic reasons. Had either of these steps been taken the incident would most likely not have happened. In the circumstances, in my view both of the respondents were negligent, as alleged in terms of paragraphs 6.3 and 6.1 above.

78. The respondents pleaded that in the event that Naheel was held to have been negligent it was excused from liability by virtue of a disclaimer notice which had been prominently displayed at all of the entrances to the mall, including the one at which the appellant had entered. It stipulated that anyone entering the premises did so ‘entirely’ at their own risk, and the owner would not be liable for any injury to their person which had been caused by the negligence (ordinary or gross), of the owner or any of its employees, agents or contractors. The appellant denied having seen such a notice, either on the day of the incident or on any other occasion.

79. It is trite that in order to rely on such a disclaimer, which the respondents contended contained the basis of an agreement whereby the appellant entered the mall, they were required to prove not only that such a notice was displayed at the time, but also that the appellant had read and accepted the terms thereof (and there was therefore actual consensus as to the basis upon which she entered the premises), or at the very least that they had taken 'reasonably sufficient' steps to ensure that the notice would come to her attention in the ordinary course (in which event she would be liable on the basis of quasi-mutual assent i.e. by her conduct she would be taken to have assented to the terms thereof).[44] Whether the respondents took such steps is an objective enquiry, which is determined by an assessment of the particular circumstances, including the size, location and nature of the display of such a notice.[45]

80. In *Durban's Water Wonderland* [46] a disclaimer notice was prominently displayed on either side of a ticket booth, where visitors to an amusement park purchased their tickets in order to enter it. The court held that any reasonable person who approached the booth would hardly have failed to see the notice, which was in large, bold lettering with white-framed borders, on either side of the cashier's window, in a place where any reasonable person would ordinarily expect to find notices which set out the terms which would govern their use of the amusement park.[47] In the circumstances it held that sufficient steps had been taken to bring the disclaimer to the attention of the plaintiff, and she was held to have assented to the terms thereof.

81. In this matter it appears that if there was a disclaimer notice at the entrance through which the appellant entered, it would have been obscured by a sign board and rolls of material on a stall which had been set out at the entrance, outside a hardware shop.[48] In my view, in such circumstances no reasonable visitor to the mall could have been expected to have seen the notice, if it was there at the time. In this regard De Jager testified that whenever ownership of the

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[44] *Durban's Water Wonderland (Pty) Ltd v Botha & Ano* 1999 (1) SA 982 (SCA) at 991D-H.
[45] *Id*, at 991H-992B.
[46] *Id*.
[47] *Id*, at 992B-D.
[48] As per the photograph at p 95 of the record.

mall changed hands the disclaimer notices would be taken down and the wording on them would be altered (presumably by sign writers) to reflect the change of owner. Such a process would take some time.

82. The respondents produced a photograph of the specimen notice which according to them was up at the time, at all the entrances. However, it reflects the owner as the St Tropez Property Group (Pty) Ltd, which, as is evident from De Jager's evidence, was the previous owner, and not the owner at the time when the incident occurred i.e. Naheel. In the circumstances, if there was a notice up at the time of the incident it could not serve to indemnify Naheel from liability. And as is evident from the terms of the notice it only purported to indemnify the owner of the mall and not Cenprop.

Conclusion

83. In the result, I would accordingly uphold the appeal and make the following Order:

83.1 The appeal is upheld with costs.

83.2 The Order of the court a *quo* is set aside and replaced with an Order as follows:

'*The defendants shall be liable jointly and severally (the one paying the other to be absolved), for:*

1. *Such damages as the plaintiff may prove, or as may be agreed, she suffered as a result of an incident which occurred on 1 June 2013, when she sustained injuries after slipping and falling in the Goodwood Mall; and*
2. *Costs of suit, including the qualifying fees and expenses and the costs of attendance at court of Mr Michael Bester (architect)*.'

M SHER

Judge of the High Court

I agree, and it is so ordered.

R ALLIE
Judge of the High Court

I agree.

M SAMELA
Judge of the High Court