IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MAKHANDA)

CASE NO.: CA 42 /2024

In the matter between:

SCHOL PROPERTY AND CONSULTING Appellant

and

KAWSHLIA GAJJAR Respondent

JUDGMENT

TOKOTA J

Introduction

[1] The appellant (hereafter referred to as the defendant) is the owner of Sunridge Village shopping mall, Gqeberha. The respondent (hereinafter referred to as the plaintiff) instituted a civil claim against the defendant for damages arising from the alleged negligent conduct of the defendant relating to the maintenance of its shopping mall. At the commencement of the proceedings the

trial court granted an order separating the merits from quantum in terms of Rule 33(4) of the Uniform Rules of Court. The trial Court held that the defendant was negligent and therefore liable for such damages as may be proved by the plaintiff. With the leave of the Supreme Court of Appeal, the defendant now appeals to this Court.

Factual Matrix

[2] The facts giving rise to the claim are to a large extent not in dispute and can be summarized as follows: In the afternoon of the 9th of April 2021 the plaintiff together with her daughter visited Sunridge Village shopping mall with a view to have dinner at San Fernando's restaurant. Upon their arrival at the mall, they parked their vehicle at the parking lot and proceeded to the entrance which was near the San Fernando's restaurant on the side of Woolworths. Before going to San Fernando's restaurant they went to a shop called Mary's to buy desserts which they would take home.

[3] After buying whatever they wanted at Mary's they were on their way to San Fernando's restaurant. The plaintiff's daughter was walking in front of her. The walkway in the mall is partly covered and consists of two types of paving bricks. The uncovered part has been paved with charcoal grey pavers. There is also what is called terracotta (red pavers) coloured paving bricks on the area under cover. The red floor surface is elevated and the charcoal grey floor surface is a

little bit lower. There is a white line that has been painted on the charcoal grey pavers at the edge of the raised level caused by the curb stone.

[4] Whilst on their way to San Fernando's restaurant the plaintiff stumbled, tripped and fell on the uneven floor. She was injured on her shoulder and subsequently underwent an operation in hospital. It was this incident which gave rise to the claim.

[5] The defendant called Mr Du Preez, an expert witness in civil engineering, who testified that the reason for the uneven floors was for the management of water flow towards the intake grids for the stormwater that runs off from the grey area. It was created to prevent the water that is running off from the non-covered area from flowing onto the walkways under the cover where people walk when it is raining. He testified further that the purpose of the white line was 'to attract attention of the raised level and the difference in level as you come from a lower level up to a higher level.'

The issue for determination:

[6] The issue for determination was whether or not the defendant, as the owner of the mall, took sufficient reasonable precautions to prevent the potential danger created by the uneven floors. It is common cause that it owed a duty of care to the members of the public entering the mall to ensure their safety. It was submitted on behalf of the defendant that precautionary steps were indeed taken to ensure the safety of the patrons by means of demarcating the elevation with a white line to warn them of the potential hazard caused by the elevation.

Parties' submissions:

[7] Counsel for the defendant submitted that the demarcation by means of a white line constituted a sufficient warning of the potential hazard caused by the uneven floors. The plaintiff, so it was contended, in fact, noticed the elevation caused by the curb stones. It was contended that the fact that the demarcation was by means of a white line was immaterial. By noticing the curb, so the argument went, it was incumbent upon the plaintiff to avoid the potential danger. She failed to do so. Once she noticed the white line she ought to have changed her direction towards the end of the white line where there was virtually no elevation.

[8] It was submitted that the trial court erred in finding that the white line fell short of adequate warning for the safety of the patrons purely on the basis that the white line was clearly visible from a distance. It was submitted that the fact that the plaintiff only noticed it at the last moment meant that she did not keep a proper lookout and did not have regard for her own safety.

[9] I pause here to mention that during the hearing of the matter on appeal I posed a question to counsel for the defendant whether a white line is normally used to indicate a danger and he conceded, quite properly in my view, that it is not normally used as an indication of danger.

[10] Counsel for the plaintiff submitted that a reasonable person in the position of the defendant would not imagine that the patrons whose attention was not on the floor, would timeously associate the white line with the danger presented by the raised floor ahead of them. He contended that it would neither be onerous nor expensive for the defendant to put up a sign expressly warning the members of the public of the presence of the raised floor. Accordingly, the trial court correctly

found that the defendant failed to take reasonable steps to warn the pedestrians of the inherent danger created by the raised surface.

Discussion:

[11] Under cross-examination on behalf of the defendant during the trial it was put to the plaintiff thus:

> "MR VAN DER MERWE: Now you have already indicated that there is a white line. What would you say was the purpose of that white line?
>
> MS GAJJAR: Well, it did not show me danger. It did not say mind the step or something like that or a red one to alert me there is a problem here (indistinct)".

[12] The defendant led no factual evidence explaining the reason why no further steps were taken, other than drawing the white line, to warn the patrons of the potential hazard. Except for the assumption by Mr Du Preez, no factual evidence was led by the defendant as to why the white line was regarded as a sufficient warning of the impending hazard. The defendant also led no factual evidence, to explain the purpose of the white line. The evidence of the expert was based on the assumption that the white line was meant to be a warning of danger to the patrons.

[13] The function of an expert is to give an opinion on the facts, and, sometimes supported by documents, given to him by the client. He must then draw inferences from those facts and documentation. The reasonableness or otherwise of drawing inferences from such facts in support of the opinion can only be determined once the plaintiff's evidence has been tested.

[14] In *AM v MEC for Health*[1] Wallis JA described the functions of an expert witness in the following terms:

> "The functions of an expert witness are threefold. First, where they have themselves observed relevant facts that evidence will be evidence of fact and admissible as such. Second, they provide the court with abstract or general knowledge concerning their discipline that is necessary to enable the court to understand the issues arising in the litigation. This includes evidence of the current state of knowledge and generally accepted practice in the field in question. Although such evidence can only be given by an expert qualified in the relevant field, it remains, at the end of the day, essentially evidence of fact on which the court will have to make factual findings. It is necessary to enable the court to assess the validity of opinions that they express. Third, they give evidence concerning their own inferences and opinions on the issues in the case and the

[1] *AM and Another v MEC for Health, Western Cape* 2021 (3) SA 337 (SCA) at para 17.

> grounds for drawing those inferences and expressing those conclusions." [Footnotes omitted.]

[15] The Learned Judge continued and said: 'The need for clarity as to the facts on which an expert's opinion is based has been stressed in several cases. In *Price Waterhouse Coopers v National Potato Co-operative Ltd*, the following passage from a Canadian judgment was cited with approval:

> "Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist. As long as there is some admissible evidence on which the expert's testimony is based it cannot be ignored; but it follows that the more an expert relies *on facts not in evidence*, the weight given to his opinion will diminish. An opinion based *on facts not in evidence* has no value for the Court.' [Emphasis added]

[16] The learned Judge of Appeal stated further: 'The opinions of expert witnesses involve the drawing of inferences from facts. The inferences must be reasonably capable of being drawn from those facts. If they are tenuous, or far-fetched, they cannot form the foundation for the court to make any finding of fact. Furthermore, in any process of reasoning the drawing of inferences from the facts must be based on admitted or proven facts and not matters of speculation. As Lord Wright said in his speech in *Caswell* v *Powell Duffryn Associated Collieries Ltd*:

"Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. . .. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture."[2] [Footnotes omitted]

17] The Learned Judge continued and said:

'Where the facts are central to the opinions of the experts, *courts should require that those facts be led in evidence* before the experts express their opinions. Primarily that is for the benefit of the court, which is thereby placed in a position where the expert's opinion can be assessed, and, if need be, queried or elucidated, in the light of the factual material before it. It is also conducive to fairness in cross-examination of the experts on behalf of the defendants. Where the case comes on appeal it facilitates a reading of the record. Lastly, if this principle is borne in mind and objections are upheld to leading the expert evidence without a proper factual foundation being laid, that should avoid situations, such as that in *Madikane*, where the case was conducted entirely on the basis of expert evidence without any factual foundation at all for the opinions being expressed.'[3] [Emphasis is mine]

[2] Ibid paras.20-21; *HAL obo MML v MEC for Health, FS* 2022 (3) SA 571 (SCA) ([2021] ZASCA 149) paras.212-213.
[3] At para.215

[18] Here we have the opinion evidence by Mr Du Preez without the benefit of the factual version of the defendant or its employees. Counsel for the plaintiff, during oral argument, submitted, quite correctly in my view, that the defendant ought to have testified to explain the presence of the white line and why it was difficult to put up signs warning the patrons of the potential hazard.

[19] Mr Du Preez was asked about his experience in other malls. His response was 'As an engineer what I am also involved in [is] large road projects. The majority of the lines are painted in white

> MR VAN DER MERWE: What would be the reason for that?
>
> MR DU PREEZ: It is purely for visibility."If the defendant had presented testimony maybe it would have been explained further that the purpose was to alert patrons of the danger not just "purely for visibility". Later the following question by defendant's counsel to Mr Du Preez appears on record:
>
> 'MR VAN DER MERWE: In your view Mr Du Preez what is the purpose of the white line?
>
> MR DU PREEZ: The purpose of the white line as it [is] painted there is to attract attention of the raised level and the difference in level as you come from a lower level up to a higher level.'
>
> Under cross-examination, the following appears:

> MR NIEKERK: …But to take it one step further the pedestrian entering that mall for the first time in her life is not going to associate different colour paving bricks with different levels. Will she?
>
> MR DU PREEZ: No.'

[20] Mr Du Preez also conceded that the defendant had a duty to make sure that the danger was clearly visible to people, impliedly conceding that the uneven floors constituted a danger to the public.

Furthermore, I am not really sure that the testimony of Mr Du Preez qualified as expert evidence. The so-called expert evidence did not establish the cogency of the *concept* of a white line nor did it establish the *technical integrity* of the process. Experts often give evidence by drawing inferences from the facts and the inferences drawn must be reasonable to exclude other inferences. In addition, he conceded that when he explained the purpose of the white line his explanation was not based on his expertise as an engineer since there is no provision for that in the building regulations but his was to simply state that it was painted to make people aware of the raised level.

[21] In *Price Waterhouse Coopers Inc & others v National Potato Co-operative Ltd & another*[4] the following was stated concerning the purpose and role of expert witnesses:

'[98] Courts in this and other jurisdictions have experienced problems with expert witnesses, sometimes unflatteringly described as 'hired guns'. In The Ikarian Reefer[5]Cresswell J set out certain duties that an expert witness should observe when giving evidence. Pertinent to the evidence of Mr Collett in this case are the following: The duties and responsibilities of expert witnesses in civil cases include the following:

1. Expert evidence presented to the Court should be and should be seen to be the independent product of the expert uninfluenced as to form or content by the exigencies of litigation …

2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise … An expert witness in the High Court should never assume the role of advocate.

3. An expert witness should state the facts or assumptions on which his opinion is based. He should not omit to consider material facts which detract from his concluded opinion. . ..

[4] (451/12) [2015] ZASCA 2 (4 March 2015) at para 98.

[5] National Justice Compania Naviera SA v Prudential Assurance Co Ltd ('The Ikarian Reefer') [1993] 2 *Lloyd's Rep 68 [QB (Com Ct)] at 81 – 82. Approved in Pasquale Della Gatta, MV; MV Filippo Lembo; Imperial Marine Co v Deiulemar Compagnia Di Navigazione* Spa 2012 (1) SA 58 (SCA) at para 27, *fn 12 and Schneider NO and Another v AA and Another 2010 (5) SA 203 (WCC) at 211E-I.*

4. An expert witness should make it clear when a particular question or issue falls outside his expertise.' These principles echo the point made by Diemont JA in Stock[6] that:

> 'An expert … must be made to understand that he is there to assist the Court. If he is to be helpful he must be neutral. The evidence of such a witness is of little value where he, or she, is partisan and consistently asserts the cause of the party who calls him. I may add that when it comes to assessing the credibility of such a witness, this Court can test his reasoning and is accordingly to that extent in as good a position as the trial Court was.'

[22] The above principles apply even where the Court is presented with the evidence of only one expert witness on a disputed fact. A white line is commonly found on the roads indicating the point at which the traffic should stop or where the traffic should not encroach such on a barrier line. In most, if not all, cases there is an additional sign indicating what danger lies ahead, for instance, a controlled intersection by means of robots or a stop sign, a sign for speed humps etc.

---

[6] *Stock v Stock* 1981 (3) SA 1280 (A) at 1296 E-G. See also *Jacobs and Another v Transnet Ltd t/a Metrorail and Another* 2015 (1) SA 139 (SCA) at para 15.

[23] The leading case on the formulation of the test for negligence is *Kruger v Coetzee 1966 (2) SA 428 (A)* at 430E where it was held that.

> 'For the purpose 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.'

[24] The legal convictions of the community require that where the defendant had knowledge of the danger posed by the uneven floors, the failure to warn members of the public within a reasonable time, resulting in possible injury to any member of the public, would be wrongful. In this regard, a legal duty would only arise where there was prior positive conduct. 'A duty may arise where the defendant has by lawful prior positive conduct (*commissio*) created a potential risk of harm to others. If the defendant then omits to take reasonable steps to prevent the risk from materialising (*ommissio*) the duty is breached[7]. The prior

---

[7] See *JP Midgley & JC Van der Walt* "*Delict*" 2 Lawsa 2nd Edition par 65; quoted *Van Vuuren v eThekwini Municipality* (1308/2016) [2017] ZASCA 124; 2018 (1) SA 189 (SCA) **at** para.20.

conduct of the defendant in the present ‘atter was the construction of uneven floors at the mall which created a potential risk of harm to patrons.

[25] n *Pretoria City Council v De Jager*[8] the following was stated:

> ‘The Council was obliged to take no more than reasonable steps to guard against foreseeable harm to the public. Whether in any particular case the steps actually taken are to be regarded as reasonable or not depends upon a consideration of all the facts and circumstances of the case. It follows that merely because the harm which was foreseeable did eventuate does not mean that the steps taken were necessarily unreasonable. Ultimately the inquiry involves a value judgment.’

[26] However, negligence is not necessarily regarded as prima facie wrongful. In *Minister of Safety and Security v Van Duivenboden*,[9] it was held that negligence is unlawful, and thus actionable, only if it occurs ‘in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm’. Where the negligence manifests itself in a positive act that causes physical harm it is presumed to be unlawful.

[8] 1997(2) SA 46 (A) at 55H-56C
[9] 2002 (6) SA 431 (SCA) at para 12.

[27] The plaintiff bears the onus of proving such negligence on a balance of probabilities. In some situations, where the plaintiff is not in a position to produce evidence on a particular aspect, the evidential burden is placed on the defendant to demonstrate what steps it had taken to comply with the standards to be expected. In such a case less evidence showing a prima facie case might suffice if the matter is uniquely within the knowledge of the defendant. The overall onus however remains with the plaintiff.

[28] Cases of customers slipping and falling in shopping malls and supermarkets have been dealt with in various matters before our Courts. In a number of those cases, the substance that caused the fall was firmly established or the facts from which inferences could be drawn were proven[10].

[29] Regarding the inquiry, with reference to *Kruger v Coetzee* supra, there is no doubt in this case that the reasonable possibility of a person tripping and falling as a result of the uneven floors was foreseeable. That was conceded by Mr Du Preez under cross-examination when he said the uneven floors created a danger

[10] *Avonmore Supermarket CC v Venter* 2014 (5) SA 399 (SCA); *Gordon v Shoprite Checkers (Pty) Ltd and Another* (32665/2010) [2014] ZAGPPHC 773 (26 September 2014; *Brauns v Shoprite Checkers (Pty) Ltd* 2004 (6) SA 211 (E),

in that someone could trip and fall. In the circumstances, the defendant was obliged to take such precautions as were reasonable to guard against that eventuality.

[30] The *diligens paterfamilias* in the position of the defendant would have foreseen and guarded against the reasonable possibility of the plaintiff slipping and falling on the uneven surface. Like anybody else who walks in a walkway where the general public not only has access but indeed is invited to enter, the plaintiff was entitled to expect that she would walk on it safely.

[31] The plaintiff was an elderly person visiting the mall for the first time. I agree with the trial Court that the defendant reasonably foresaw the inherent danger created by the uneven floors and therefore owed a duty to the members of the public to guard against the eventuality of harm. It failed to take adequate steps to ensure the safety of the members of the public. One cannot prescribe what steps it should have taken but a warning either in the form of a sign warning people about the danger would have served the purpose. Counsel for the defendant conceded that there was nothing that prevented the defendant from putting up such signs. The photographs show that there are at least three poles (one with a sign attached) in the immediate vicinity where the plaintiff fell. He submitted

instead that it was not necessary to do so. I disagree. I conclude therefore that negligence was established.

Causation:

[32] The next question to be examined is whether the negligent conduct of the defendant was the cause of the injury of the plaintiff. The onus rested with the plaintiff to show that, but for the failure to give a timely warning by means of placing visible warning signs, she would not have tripped and fallen.

[33] In *Oppelt v Department of Health, Western Cape*[11] it was said**:**

'[45] The Supreme Court of Appeal, in *Van Duivenboden*, observed:

'A plaintiff is not required to establish the causal link with certainty but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than an exercise in metaphysics.'

[46] And in Gore NO it held:

[11] 2016(1) SA 325 (CC) at paras.45-48.

'Application of the but-for test *is not based on mathematics, pure science or philosophy*. It is a matter of common sense, based on the practical way in which the ordinary person's mind works against the background of everyday life experiences.' [Emphasis added.]

[47] In *Lee* Nkabinde J said the following about causation in the case of a negligent omission:

'(I)n the case of an omission the but-for test requires that a hypothetical positive act be inserted in the particular set of facts, the so-called mental removal of the defendant's omission. This means that reasonable conduct of the defendant would be inserted into the set of facts. However, as will be shown in detail later, the rule regarding the application of the test in positive acts and omission cases is not inflexible. There are cases in which the strict application of the rule would result in an injustice, hence a requirement for flexibility.

[48] While it may be more difficult to prove a causal link in the context of a negligent omission than of a commission, *Lee* explains that the 'but-for' test is not always the be-all and end-all of the causation enquiry when dealing with negligent omissions. The starting point, in terms of the 'but-for' test, is to introduce into the facts a hypothetical non-negligent conduct of the defendant and then ask the question whether the harm would have nonetheless ensued. If, but for the negligent omission, the harm would not have ensued, the requisite causal link would have been established. The rule is not inflexible. Ultimately, it is a matter of common sense whether the facts establish a sufficiently close link between the harm and the unreasonable omission.' [Footnotes omitted]

[34] Mr Du Preez conceded that there is no requirement in the building regulations for the marking of a white line and that the defendant *'bore a duty to*

make sure that the danger was clearly visible to people'. The white line did not serve the purpose. According to Mr Du Preez, it was there to '*attract attention of the raised level and the difference in level as you come from a lower level up to a higher level.'*

[35] In all the circumstances I am unable to find differently from the trial Court.

Order

[36] In the result the following order will be issued:

1. The appeal is dismissed.

2. The appellant is ordered to pay costs on scale B as contemplated in Rule 69 (7) including costs of the application for leave to appeal.

B R TOKOTA
JUDGE OF THE HIGH COURT

I agree:

D O POTGIETER
JUDGE OF THE HIGH COURT

I agree

M W NOBATANA
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Appellant	:	*J G van der Merwe*
Instructed by	:	Huxtable Attorneys
Counsel for the Respondent	:	*D Niekerk*
Instructed by	:	McCallum Attorneys
Heard on	:	11 November 2024
Judgment Delivered on	:	3 December 2024